Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment:	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

To: The Commission

REPLY COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AND THE DAS FORUM (A MEMBERSHIP SECTION OF PCIA)

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SUMMARY

Broadband technologies stand to benefit all Americans, as President Obama and Chairman Genachowski recognize in their goals to facilitate the delivery of broadband nationwide. Broadband services are dependent upon infrastructure, the build out of which is currently subjected to persistent and costly barriers. Commenters confirm that barriers to broadband infrastructure deployment remain significant and ongoing. In order to achieve our national goal of ubiquitous broadband in a timely manner, the Federal Communications Commission ("FCC" or "Commission") must confront these barriers.

While the Commission has taken positive steps in recent years, including adopting the *Shot Clock Ruling* in 2009 and the *Pole Attachment Order* in 2011, many challenges remain at the state and local levels. PCIA and The DAS Forum support and appreciate these actions, but understand that more must be done at the federal level to facilitate build out of broadband infrastructure in a timely and cost-effective manner. Barriers can increase the costs of siting by over twenty percent, slowing billions in economic activity that could be realized from new broadband deployment. The record reflects that Commission action is needed to confront these barriers, in order to accelerate broadband infrastructure build out and investment.

For the reasons stated below, the PCIA and The DAS Forum urge the Commission to address these barriers through the following recommendations:

Clarifying longstanding ambiguities in the Communications Act: Delays at the local level can be attributed to ambiguities in the Communications Act (the "Act"), which provide for loopholes with which localities can delay and burden the siting process. For example, the re-review of a permitted underlying facility designated "legal, non-conforming" status under the zoning process is a significant problem that hinders the ability of wireless providers to efficiently utilize existing infrastructure, which could be resolved by Commission action interpreting Section 332(c)(7)(B)(i)(I) of the Communications Act. The Commission can and should issue interpretive rules that will clarify longstanding ambiguities the Communications Act, eliminate unintended consequences of those ambiguities that delay deployment of new services, and generally provide service providers, state and local governments and consumers with greater certainty as to how the Act will be interpreted in this area.

Clarifying "Shot Clock" rules to avoid abuse: While the *Shot Clock Ruling* was a step in the right direction, a lack of clarity and inconsistent treatment in the law has led to local jurisdictions drawing out the process – and the expense and delay of taking a local jurisdiction to court presents applicants with no viable remedy. The Commission should amend the *Shot Clock Ruling* to reflect the shorter timeframes for collocation application review and deem applications granted at the expiration of the review period.

Streamlining and clarifying the wireless siting process for DAS: Because of ambiguities in Section 253 and Section 332(c)(7) of the Communications Act, DAS is often subjected to the same expensive and time-consuming review and approval processes as a wireless tower and other macro sites, which effectively cancels out many of the benefits. The Commission should clarify the *Shot Clock Rulings* application to DAS, encourage best practices and policies that treat DAS as a system as opposed to its individual elements, and develop

outreach initiatives to educate state and local governments about the benefits of DAS. In addition, the National Environmental Policy Act ("NEPA") and Section 106 of the National Historic Preservation Act ("NHPA") should be adapted to changing technologies, including DAS, by fully excluding DAS Deployments from FCC Environmental Processing under the NEPA rules.

Supporting "collocation by right": Collocations can improve coverage, capacity, and competition. However, many jurisdictions have burdensome application requirements, utilize wireless "consultants," or enter into lengthy moratoria that unnecessarily burden collocation, further slowing the deployment of mobile broadband technologies. PCIA and The DAS Forum urge the Commission to formally request that Congress adopt legislation to permit collocations "by right" without discretionary review. Such legislation would reduce barriers to the expansion of wireless coverage and capacity through collocation and accelerate the upgrade of existing equipment to next generation equipment.

Expanding efforts to educate state and local policy makers about the wireless industry: PCIA and The DAS Forum support the FCC Technology Advisory Council's recommendation for addition educational efforts at the state and local level. The record reflects that there is confusion and conflict between the wireless industry and local governments. By helping local policymakers understand the intricacies of mobile broadband technologies and the how and why of effective and reasonable siting policies. Helping local policymakers understand the intricacies of mobile broadband technologies will help all parties understand the need for reasonable and effective siting policies.

Reducing barriers to federal lands and buildings: The National Broadband Plan first suggested that Congress and the Executive Branch work to lower the cost and expedite the deployment of broadband facilities. One method of accomplishing such a goal is to ease the use of the vast resource of federal lands and buildings for wireless infrastructure siting. Therefore, the FCC should engage in outreach to Congress and the Executive Branch to improve access to federal lands and buildings.

The record confirms that the Commission has ample authority to take the actions discussed in the NOI and recommended in the initial comments submitted by PCIA and The DAS Forum to facilitate broadband infrastructure deployment. The attempted arguments otherwise on the record are unsupported by law and ineffective to inhibit the authority of the Commission. PCIA and The DAS Forum urge the Commission to engage in outreach and pursue the best practices and legislative and regulatory solutions to improve rights of way access and wireless siting so that wireless infrastructure deployment can flourish and continue to meet the Nation's growing mobile broadband needs.

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PCIA – The Wireless Infrastructure Association ("PCIA") and The DAS Forum, a membership section of PCIA ("The DAS Forum") submit these reply comments in response to the *Notice of Inquiry* seeking to develop a record on ways to improve rights-of-way policies and wireless facilities siting requirements.[1] PCIA and The DAS Forum support the Commission's goal in this proceeding of identifying ways to "reduce the costs and time required for broadband deployment, both fixed and mobile, which will help unleash private investment in infrastructure, increase efficient use of scarce public resources (including spectrum), and increase broadband adoption."[2]

PCIA is the trade association representing the wireless telecommunications infrastructure industry. PCIA's members develop, own, manage, and operate more than 125,000 telecommunications towers and antenna structures upon which cell sites can be collocated. PCIA

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[1] *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384 (2011) ("*NOI*").

[2] *Id*. at 5384-85 ¶ 2 (citation omitted).

seeks to facilitate the widespread deployment of communications networks across the country, consistent with the mandate of the Telecommunications Act of 1996.[3] The DAS Forum is a broad-based non-profit organization dedicated to the development of distributed antenna systems ("DAS") element of the Nation's wireless network.

DISCUSSION

Infrastructure deployment in all of its forms – including new tower sites, collocations on existing structures, and DAS – is essential to improving access to wireless services and stimulating broadband deployment. Yet, as the *NOI* recognizes and the record reflects, rights-of-way access and wireless siting challenges act as persistent barriers to infrastructure deployment. Accordingly, Section I discusses why this proceeding is key to meeting the national broadband goals that the growing need for wireless infrastructure. Section II outlines the significant and ongoing barriers to broadband deployment. Section III proposes a combination of solutions supported by comments on the record, including outreach activities, best practices and legislative and regulatory actions that should be pursued by the Commission.[4] Finally, Section IV details how the record supports the Commission's authority to implement these solutions.

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[3] Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 ("1996 Act" or the "Telecommunications Act") (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . regulating methods that remove barriers to infrastructure investment") (reproduced in the notes following 47 U.S.C. § 157).

[4] *NOI*, 26 FCC Rcd at 5388 ¶ 8 (citing A National Strategy: The FCC's Broadband Acceleration Initiative – Reducing Regulatory Barriers to Spur Broadband Build Out (Feb. 9, 2011) ("Broadband Acceleration Initiative"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A2.doc.

I. THIS PROCEEDING IS KEY TO MEETING THE NATIONAL BROADBAND GOALS AND THE GROWING NEED FOR WIRELESS INFRASTRUCTURE.

President Obama,[5] Congress[6] and Chairman Genachowski,[7] have repeatedly emphasized the importance of building out the Nation's broadband infrastructure and have taken significant steps in furtherance of that goal. PCIA and The DAS Forum welcome this Commission initiative to address unnecessary burdens that delay deployment of wireless services.[8] Ubiquitous mobile broadband requires robust investment in and expansion of wireless infrastructure, which cannot occur without Commission intervention and for cooperation among stakeholders.

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[5] President Obama set a national goal of enabling businesses to provide high-speed wireless services to at least 98 percent of all Americans within five years, recognizing that broadband "promises to benefit all Americans, bolster public safety, and spur innovation in wireless services, equipment, and applications." The White House Office of the Press Secretary, Fact Sheet, President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011) ("Wireless Initiative Fact Sheet"), *available at* http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access. During the 2011 State of the Union Address, the President shared his vision for a connected America, prior to launching his wireless initiative. President Barack Obama, State of the Union Address (Jan. 25, 2011) (State of the Union Address), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address. *See also* President Barack Obama, Remarks on the National Wireless Initiative (Feb. 10, 2011) ("President's Wireless Initiative Remarks"), *available at* http://www.whitehouse.gov/the-press-office/2011/02/10/remarks-president-national-wireless-initiative-marquette-michigan.

[6] Congress recognized the need for a broadband initiative in the 2009 stimulus bill, which funded the Broadband Technologies Improvement Program at the Department of Commerce and the Broadband Initiatives Program at the Department of Agriculture and directed the FCC to prepare the National Broadband Plan. American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, 516 (2009).

[7] The Chairman placed broadband at the top of his agenda, and has identified the removal of obstacles to robust and ubiquitous infrastructure build out as "one of the Commission's top priorities" needed to advance its broadband goals. *See* Chairman Julius Genachowski, "The Clock Is Ticking," Remarks on Broadband, Washington, DC, at 2 (Mar. 16, 2011) ("Genachowski March 16th Remarks"), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business//db0316/DOC-305225A1.pdf. *See* Chairman Julius Genachowski Remarks, "Jobs and the Broadband Economy," LivingSocial Washington DC, at 6-7 (Sept 27, 2011) ("Sept. 27, 2011 Chairman Remarks"), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0927/DOC-309898A1.pdf. *See NOI*, 26 FCC Rcd at 5404 (Statement of Chairman Julius Genachowski); *see also* FCC Chairman Julius Genachowski Remarks, CTIA Wireless 2011, Orlando, FL (Mar. 22, 2011) ("Genachowski March 22nd Remarks"), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0322/DOC-305309A1.pdf.

[8] *See* NOI, 26 FCC Rcd at at ¶26.

A. Citizens and Businesses Need Intervention in this Arena to Harness the Benefits of Wireless Service.

Within this proceeding, the FCC has the opportunity to take significant, beneficial action that can improve the economic situation of all Americans. More and more citizens understand that the benefits of broadband – job opportunities, economic growth, and technological advancement – are not possible without deployment of wireless infrastructure to support those uses.[9] It is estimated that by 2015, a majority of Americans will utilize a wireless device as their primary Internet access tool.[10] Wireless service is therefore becoming essential to access the vast resources and benefits the Internet enables, from commerce to political inclusion. Further, more than 70 percent of all emergency calls each day are placed with a wireless device. Without wireless infrastructure, the ability to access first responders is significantly hindered.[11] Wireless services from basic voice communication to broadband require robust wireless infrastructure.

As Chairman Genachowski aptly stated, "[o]ur ability to meet this moment and seize the opportunities of this new technology while overcoming the challenges is critical to our economic recovery and long-term global competitiveness. No [type of] infrastructure matters more for job

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[9] Jason Perlow, *Dear New Jersey: Fix our crappy infrastructure, NOW*, ZDNET (Sept. 5, 2011), http://www.zdnet.com/blog/perlow/dear-new-jersey-fix-our-crappy-infrastructure-now/18455; Larry Downes, *Does your iPhone service suck? Blame city hall*, CNET NEWS (Sept. 8, 2011), http://news.cnet.com/8301-1035_3-20102911-94/does-your-iphone-service-suck-blame-city-hall/#ixzz1Z6A6GM00.

[10] *See* Hayley Tsukayama, *IDC: Mobile Internet users to outnumber wireline users by 2015*, THE WASHINGTON POST (Sept. 12, 2011), http://www.washingtonpost.com/blogs/post-tech/post/idc-mobile-internet-users-to-outnumber-wireline-users-by-2015/2011/09/12/gIQAkZP7MK_blog.html?wprss=post-tech ; http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats; MobiThinking, Global Mobile Statistic 2011, *available at* http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats.

[11] FCC.gov, Guide: Wireless 911 Services, http://www.fcc.gov/guides/wireless-911-services.

creation and economic growth in the 21st century than broadband Internet."[12] Broadband creates 2.6 new jobs for every one job lost, possibly amounting to an additional 2.4 million new jobs with an seven percent increase in broadband penetration and 771,000 new jobs as a result of 4G-network deployment alone.[13] Specifically, improving infrastructure supports the use of broadband; the use of broadband supports broadband applications and technology; and the use of broadband fosters the need to improve infrastructure, which creates jobs and fosters the economy.[14] Therefore, the deployment of broadband has a significant impact on the economy and the Commission is correct to seek ways to hasten its deployment.

B. In Order to Meet Consumer Demand and Accelerate Broadband Deployment, FCC Action is Needed.

New mobile devices, cloud computing applications, and advanced virtualization services, has increased demand for spectrum, capacity and coverage, spurring the need for deployment of infrastructure.[15] Without action from the Commission, friction between the wireless industry and local jurisdictions will only further inhibit the ability to deploy the infrastructure necessary to provide the services that consumers, businesses and first responders demand.

Chairman Genachowski recognized that spectrum and infrastructure deployment are two of the gaps that need to be simultaneously resolved during the Broadband Acceleration

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[12] News Release, Broadband: A Driving Force For American Job Creation & Economic Growth, Sept. 27, 2011, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0927/DOC-309892A1.pdf ("News Release, Sept. 27, 2011 Chairman Remarks").

[13] Sept. 27, 2011 Chairman Remarks at 3-4.

[14] *See, e.g.*, Comments of CTIA – The Wireless Association®, WC Docket No. 11-59, *Notice of Inquiry*, at 6 (filed July 18, 2011) ("CTIA Comments").

[15] *See* CTIA Comments at 6 (citing Genachowski March 16th Remarks).

Initiative.[16] In the American Jobs Act, President Obama recognized that in order to accomplish the national goal of enabling businesses to provide high-speed wireless services to at least 98 percent of Americans within five years, the goals of both spectrum allocation and deployment gaps must be resolved.[17]

The benefits of mobile broadband rely upon robust wireless infrastructure. At the Broadband Acceleration Conference earlier this year, the Chairman recognized that "building a robust 21st century communications infrastructure is essential to growing our economy, creating jobs, and our global competitiveness,"[18] and "[w]e can't get to next generation broadband (4G) without new towers or new antennas."[19] In fact, the importance of wireless infrastructure and speeding deployment is essential to help the Commission achieve its goals of improving access to wireless services and stimulating broadband deployment to unserved areas. Removing siting barriers and improving access will bring the Commission one step closer to realizing its goals of mobilizing and connecting Americans through wireless communications.[20] Infrastructure will only be built out in as efficient and effective manner possible with action and guidance from the FCC.

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[16] Sept. 27, 2011 Chairman Remarks at 7.

[17] Fact Sheet, The American Jobs Act (Sept. 8, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/08/fact-sheet-american-jobs-act ("American Jobs Act Fact Sheet"); Wireless Initiative Fact Sheet.

[18] *See Prepared Remarks*, Chairman Julius Genachowski, Federal Communications Commission, Broadband Acceleration Conference, Washington, DC at 1.\ (Feb. 9, 2011) ("Genachowski February 9th Remarks"), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf.

[19] *Id*. at 2.

[20] *See generally* Sept. 27, 2011 Chairman Remarks.

C. This Proceeding Provides an Opportunity for the FCC to Act to Break Down Barriers to Broadband Deployment.

Commenters questioned why the Commission is examining local siting practices.[21] The record demonstrates that local regulation of the placement of wireless facilities remains a persistent barrier to the deployment of wireless infrastructure.[22] FCC involvement is vital to break down these barriers and facilitate cooperation between the industry and localities. As the Chairman recognizes, "[w]e overwhelmingly rely on the private sector to build out our broadband infrastructure, . . . [b]ut government also has an essential role to play in a number of areas."[23] The Commission has set ambitious targets in the National Broadband Plan ("NBP"), but even if the FCC succeeds in allocating and licensing that spectrum in a timely fashion, the accomplishment will fall short because the spectrum will not be able to be used without the build out of wireless infrastructure to support wireless services.[24] Facilitating wireless infrastructure build out necessitates examination of local practices in order to streamline the siting process.

We appreciate the Commission's recognition in its comprehensive mobile broadband agenda that infrastructure plays a critical role in sustaining the Nation's broadband growth.[25] Although the Commission has already taken several significant steps to reduce barriers to

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[21] Comments of The National League of Citites, et. al., WC Docket No. 11-59, *Notice of Inquiry*, at 3, FN 3 (filed July 18, 2011) ("NLC Comments").

[22] Comments of PCIA – The Wireless Infrastructure Association and The DAS Forum, WC Docket No. 11-59, *Notice of Inquiry*, at 10-34 (filed July 18, 2011) ("PCIA Comments").

[23] *News Release,* Sept. 27, 2011 Chairman Remarks. *See also* Sept. 27, 2011 Chairman Remarks at 6 ("In our country we overwhelmingly rely on the private sector to build out our broadband infrastructure, and that's the right course. Government has a limited but essential role to play to facilitate private investment and innovation, and ensure that infrastructure gaps are addressed.").

[24] *See* CTIA Comments at 13-14.

[25] Genachowski March 22nd Remarks at 6.

broadband infrastructure deployment and investment, more action is needed.[26] PCIA and The DAS Forum were joined by many commenters who recognized that although the *Shot Clock Ruling* has been beneficial, more assistance is needed from the FCC.[27]

PCIA and The DAS Forum appreciate the Commission's efforts thus far, which the Chairman recognized as important initial steps,[28] but the record demonstrates that additional Commission action is warranted.[29] Local barriers to the deployment of wireless infrastructure persist and consistency is necessary to develop deployment plans. For example, in Pennsylvania

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[26] *See Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, 14021 ¶ 71 (2009) ("*Shot Clock Ruling*"), *recon. denied*, 25 FCC Rcd 11157 (2010), *appeal pending sub nom., City of Arlington and City of San Antonio v. FCC*, Nos. 10-60039 & 10-60805 (5th Cir.). The lack of a decision within these timeframes constitutes a "failure to act" that allows the applicant to seek redress in court. *Shot Clock Ruling*, 24 FCC Rcd at 14021 ¶ 71. The *Shot Clock Ruling* also found that denial of a wireless facility siting application solely because service is available from another provider constitutes an effective prohibition of service in violation of Section 332(c)(7)(B). *Id*. *See* PCIA Comments at 6-10. *Pole Attachment Order*, 26 FCC Rcd at 5244 ¶ 8, 5252 ¶ 22. Using its authority under Section 224 of the Act, the Commission set a maximum timeframe of 148 days for utility companies to allow pole attachments in the communications space, with a maximum of 178 days allowed for attachments of wireless antennas on pole tops, and an extra 60 days for large orders. *Id*. It also set the rate for attachments by telecommunications companies at or near the rate paid by cable companies, and confirmed that wireless providers are entitled to the same rate as other telecommunications carriers. *Id*. at 5244 ¶ 8. Finally, the order required utilities to explain the capacity, safety, reliability, or engineering basis for denying an attachment request. *Id*. In March 2001, the Commission and national historic groups entered into an NPA to simplify procedures for review of antenna collocations, pursuant to which many collocations are exempted from the Section 106 review process. Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), *available at* 47 C.F.R. Part I, Appendix B ("Collocation Agreement" or "2001 NPA"). In September 2004, the Commission and national historic and tribal groups executed an NPA that clarified and added predictability to the Section 106 review process for facilities not covered by the 2001 NPA, including new towers and non-exempt collocations. Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (2004), *available at* 47 C.F.R. Part I, Appendix C (2004) ("2004 NPA"). *See* FCC Wireless Telecommunications Bureau: Towers and Antennas, *available at* http://wireless.fcc.gov/outreach/index.htm?job=tower_notification (visited July 15, 2011).

[27] *See* CTIA Comments at 3; Comments of Verizon and Verizon Wireless, WC Docket No. 11-59, *Notice of Inquiry*, at 4 (filed July 18, 2011) ("Verizon Comments"); Comments of AT&T, WC Docket No. 11-59, *Notice of Inquiry*, at 13-20 (filed July 18, 2011) ("AT&T Comments"); PCIA Comments at 12-13.

[28] Sept. 27, 2011 Chairman Remarks, at 6 ("We've removed more than fifty unnecessary regulations, and lifted needless restrictions on the use of spectrum. We streamlined the process of attaching broadband wires and wireless equipment to utility poles. We adopted a tower siting shot clock to speed mobile broadband… We've gotten a lot done. But there is more to do.").

[29] CTIA Comments at 3; Verizon Comments at 4; AT&T Comments at 13-20; PCIA Comments at 12-13.

alone there are 2,600 municipalities, many of which have different review processes, application and maintenance requirements and fee amounts.[30] Commission guidance can further cooperation between localities and the industry. Best practices serve as one such method of cooperation and coordination, as supported by various commenters on the record.[31]

Regulatory roadblocks, such as those discussed in Section II below, create obstacles to deployment and account for an estimated twenty percent of the cost of broadband build out.[32] As mentioned in our initial comments, it is projected that "removing red tape and expediting approval processes could unleash $11.5 billion in new broadband infrastructure investment over two years."[33] The Chairman recognized that we need to "cut more red tape and pursue all smart policies to speed network deployment and ensure investment dollars go to building and upgrading networks, not the inefficiencies of the process"[34] to "help unleash private investment in infrastructure, increase efficient use of scarce public resources (including spectrum), and increase broadband adoption."[35]

The *NOI* provides an opportunity for the industry to work with localities to find a suitable solution which meets the needs of the industry, as well as the concern of localities. Comments

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[30] Pennsylvania local investment trust, https://www.plgit.com (last visited Sept. 28, 2011).

[31] *See, e.g.*, Comments of City of Doral at al., WC Docket No. 11-59, *Notice of Inquiry*, at 1 (filed July 18, 2011) ("Doral Comments"); Comments of Montgomery County, MD, WC Docket No. 11-59, *Notice of Inquiry* at 20 (filed July 18, 2011) ("Montgomery County Comments"); Comments of NYC Department of Information Technology and Telecommunications, WC Docket No. 11-59, *Notice of Inquiry* at 3-4, 13-14 (filed July 18, 2011) ("NYC Department of Information Technology and Telecommunications Comments"; Comments of American Public Works Association, WC Docket No. 11-59, *Notice of Inquiry* at 3 (filed July 18, 2011) ("American Public Works Association Comments"); Verizon Comments at 39; PCIA Comments at 44-51.

[32] *FCC Eyes Reducing Barriers to Broadband Buildout*, REUTERS, Feb. 8, 2011, *available at* http://www.reuters.com/article/2011/02/09/us-usa-broadband-buildout-idUSTRE7180J820110209; *see also* Genachowski February 9th Remarks at 2; NBP at 113.

[33] Genachowski February 9th Remarks at 2.

[34] Genachowski March 22nd Remarks at 7.

[35] *NOI*, 26 FCC Rcd at 5384-85 ¶ 2 (citation omitted).

submitted on the record by providers, coalitions and localities demonstrate the friction that exists and the opportunity that this proceeding brings for a path forward. PCIA and The DAS Forum suggest steps the Commission should take to "spur the deployment and lower the costs of wireless build out,"[36] given the continue divergence of views between localities, consultants, and the wireless industry.[37]

II. COMMENTERS CONFIRM THAT BARRIERS TO BROADBAND DEPLOYMENT ARE SIGNIFICANT AND ONGOING.

As discussed below, the record reflects that barriers continue to inhibit the build out of mobile broadband. These roadblocks make the efficient use of existing, permitted wireless facilities difficult, subjecting collocation and modification to re-review, creating an adversarial atmosphere in the permitting process, circumventing the *Shot Clock Ruling*, and restraining the deployment of DAS and other infrastructure solutions crucial to the wireless networks.

A. Barriers Remain To the Efficient Use of Existing, Permitted Wireless Facilities.

1. Despite Their Recognized Benefits Collocations and Modifications Are Often Subject to *De Novo* Review and Burdensome Application Requirements.

As the wireless industry rises to the challenge of building out the networks of tomorrow, it must utilize existing resources as efficiently as possible in order to adequately stretch investment across the country and meet build out schedules. A vital resource is the network of

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[36] Genachowski March 22nd Remarks at 7.

[37] *Compare* Comments of Coalition of Texas Cities, WC Docket No. 11-59, *Notice of Inquiry*, at 27-28 (filed July 18, 2011) ("Coalition of Texas Cities Comments"); Comments of League of Oregon Cities, WC Docket No. 11-59, *Notice of Inquiry*, at 3-4 (filed July 18, 2011) ("Coalition of League of Oregon Cities Comments"); NLC Comments at 8, 34-39; Comments of City of Virginia Beach, WC Docket No. 11-59, *Notice of Inquiry*, at 1 (filed July 18, 2011) ("City of Virginia Beach Comments"); *with* CTIA Comments at 16-25; WC Docket No. 11-59, *Notice of Inquiry* (filed July 18, 2011); Verizon Comments at 6-16.

wireless facilities that support the wireless networks delivering wireless voice service to 98 percent of Americans.[38] However, despite the resources that were initially expended to construct this network, wireless providers are often prevented from utilizing existing infrastructure to its full potential.

A common approach for wireless providers building out new networks of advanced wireless services, such as LTE, HSPA+, and WiMAX, is to swap existing antennas for new antennas that can support both current and new services. Another common approach is to collocate new antennas on existing wireless facilities, which were placed to maximize coverage and capacity.

Further, with the construction of new wireless facilities becoming more challenging and time-consuming,[39] collocation and modification are increasingly important tools for meeting broadband demand. In their comments, PCIA and The DAS Forum highlighted the unnecessary and burdensome "re-review" that wireless providers face when collocating antennas on an existing wireless facility or when modifying a facility.[40] The record indicates that some jurisdictions encourage collocation whenever possible.[41] However, ordinances that encourage the collocation of antennas on existing towers often require a demonstration that no existing

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[38] Fact Sheet, President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011) ("Fact Sheet"), *available at* http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access

[39] AT&T Comments at 11-12.

[40] PCIA Comments at 20-22.

[41] *See, e,g.*, Comments of Greater Metro Telecom Consortium, et al., WC Docket No. 11-59, *Notice of Inquiry*, at 24 (filed July 18, 2011) ("Greater Metro Telecom Comments").

towers or structures can accommodate the wireless carrier's equipment before any new tower construction is permitted.[42]

The fact remains that collocation and modification are still subject to *de novo* review, unnecessary permit application requirements, and other barriers to deployment in many jurisdictions.[43] *De novo* review, or full discretionary zoning review, of collocations and modifications does not address "core 'zoning' concerns."[44] In fact, in most cases the underlying wireless facility has passed the locality's own review process, which carefully considers the impact of the use of the facility to provide wireless telecommunication services on the locality's health, safety and welfare.[45] Thus, a jurisdiction already was given ample opportunity to thoroughly vet the design and use of the facility and approved it for construction and operation. A collocation or modification that does not substantially change the size of the facility does not materially change the impact of the wireless facility enough to warrant a re-review.

Commenters also note the extraneous and onerous application requirements that often accompany such re-reviews for collocations. Verizon states that many jurisdictions, "make no

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[42] PCIA Comments at 19; NLC Comments at 32.

[43] For an example of *de novo* review of collocations, *see* Comments of Maricopa County, Arizona, WC Docket No. 11-59, *Notice of Inquiry* (filed July 18, 2011). Although Maricopa County maintains that they do not require de novo review for collocations, a close reading reveals quite the opposite. Maricopa County states "In connection with [a special use permit], an applicant is required to provide a specific site plan of development which depicts the entire area of the special use permit as well as specific details of everything placed on the ground. If new ground equipment is proposed, a new site plan and an amended special use permit would be required." *Id*. at 1-2. In short, a wireless provider must forecast the amount of collocations the wireless facility will accommodate during the permitting process and "show the future pads for ground equipment in connection with a potential collocation." *Id*. at 2. While this ordinance provides for collocation on new infrastructure by administrative, it subjects existing infrastructure without site plans – such as facilities built by carriers who were not envisioning collocation at the time the facility was constructed and could not possibly foresee the industry change to shared infrastructure – to re-review for a collocation. These facilities without site plans are effectively subject to a de novo review despite being approved.

[44] Verizon Comments at 7-8; CTIA Comments at 33.

[45] PCIA Comments at 18-19.

distinction between true modifications to a tower structure or facility, versus improvements needed to provide improved wireless service, such as upgrading old antennas to provide more capacity or to implement new broadband technologies, reorienting antennas to meet changes in demand in the area served by the tower, or replacing cable."[46] Similarly, AT&T notes that some jurisdictions "impose numerous time-consuming pre-application requirements on applicants before they will even accept an application."[47]

Though some commenters conclude that problems with the permitting process that do arise "are usually caused by the applicants" and their unfamiliarity with local procedures and practices,[48] these are not merely isolated incidents attributable to a misreading of application guidelines or similar mistakes. Wireless providers carefully weigh the costs and benefits of a deployment, particularly in regards to financial and time commitment required in the application process. If the expense and time of the process is unnecessarily and substantially increased, the wireless provider faces the decision to proceed with deployment or give up.

Finally, a significant amount of resources can be expended by local governments in the review of wireless facility siting applications.[49] If an impasse is reached and litigation becomes necessary, still more resources from both the applicant and the jurisdiction are lost. By truly streamlining the review process for collocations and modifications, local governments can reduce the cost of application review while also tapping into the economic benefits of ubiquitous

[46] Verizon Comments at 7-8.

[47] AT&T Comments at 15.

[48] NLC Comments at 34-35.

[49] PCIA Comments at 23-24.

wireless broadband coverage.[50] Until collocations and modifications can be performed "by right," wireless providers will struggle to meet consumer demand for wireless broadband and national goals for broadband deployment.

B. Municipal Consultants Introduce Additional Delay and Expense to the Siting Process While Providing Little Countervailing Benefit.

As discussed above in Section II(A), *de novo* review of collocations and modifications and burdensome application requirements unnecessarily delay the build out of advanced wireless services. These barriers and more are increasingly attributable to third-party municipal consultants. As the record clearly demonstrates, consultants foster an unnecessarily adversarial atmosphere in the permitting process while providing little countervailing benefit to jurisdictions.

1. The Record Details the Barriers Consultants Cause.

In its comments, PCIA and The DAS Forum provided a list of jurisdictions that utilized problematic consultants.[51] While the services rendered by consultants vary from jurisdiction to jurisdiction, the track record of consultant-driven deployment barriers and disruptions – many of which are noted in the record in this proceeding and others[52] – warrants the Commission's attention as it takes stock of the "key challenges . . . in expanding the reach and reducing the cost of broadband deployment."[53] PCIA and The DAS Forum maintains that,

> consultants [who] claim to specialize in wireless facility zoning prey upon a misperception that the permitting process for wireless facilities, especially collocations, is unique and/or more complex than other permitting processes. Wireless facility siting decisions

[50] *Id.*

[51] *Id.*

[52] Verizon Comments at 8-9; PCIA Comments at 23-24.

[53] *NOI*, 26 FCC Rcd at ¶ 1.

> are by nature land use decisions that are no different in substance than any other land use decision.[54]

The wireless industry, from neutral host providers to wireless carriers and from tower providers to DAS providers, details vividly the deployment barriers created by consultants.[55]

Not every consultant uses the same playbook for every jurisdiction. Consultants are also utilized to revise master plans and ordinances that single out wireless infrastructure.[56] A consultant may be retained in order to establish a new regulatory scheme for the placement and modification of wireless facilities, leaving the jurisdiction's staff to strictly follow overly burdensome ordinances. Whether reviewing applications or writing ordinances, consultants can result in layer upon layer of unnecessary red-tape.

PCIA and The DAS Forum's discussion of consultants in its comments does not establish a checklist to determine whether a consultant or a consultant-drafted ordinance is problematic. As noted above, consultants can delay deployment and increase costs in a variety of manners, including but not limited to those discussed on the record. While a consultant's work may not require the use of an escrow account in every instance, by unnecessarily distinguishing wireless facilities in permitting process and in other regulatory matters, a consultant can leverage the misconceptions of wireless infrastructure to drag out the review, increase costs and delay deployment.[57] For example, a new trend among consultants is to have jurisdictions adopt a

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[54] PCIA Comments at 23.

[55] Verizon Comments at 6-7; Comments of NextG Networks, Inc., WC Docket No. 11-59, *Notice of Inquiry*, at 3, 11 (filed July 18, 2011) ("NextG Comments").

[56] Verizon Comments at 6.

[57] The City of Margate, FL, whose comments in the docket were filed by an employee of CityScape, notes that PCIA opposed their attempt to "provid[e] for simpler submittal requirements for wireless broadband infrastructure (as opposed to traditional cellular/PCS infrastructure)." Comments of the City of Margate, Florida, WC Docket No. 11-59, *Notice of Inquiry* (filed June 8, 2011) (filed on behalf of the city by Anthony T. Lepore); *see also* "Key Project
(continued on next page)

wireless facility registry. These registries require wireless facility owners to file an annual tower registration accompanied with incredibly high registration fees, in most cases $1000 per structure and $1000 per carrier collocated thereon.[58] These registries are thinly-veiled taxes that discourage the efficient use of wireless infrastructure.

PCIA and The DAS Forum conduct outreach to jurisdictions that are revising their wireless facility siting ordinance, considering the use of a consultant, or considering adopting a wireless facility registry to address the jurisdiction's underlying concerns. The goal of this

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Leaders," CityScapeGov.com (last visited Sept. 30, 2011) (listing Anthony T. Lepore as Vice President of CityScape). First, PCIA notes that the revision process between CityScape and PCIA was indeed cooperative. Second, PCIA must clarify its concern over distinguishing "wireless broadband infrastructure" from "wireless communications infrastructure." In its February 14, 2011 letter to Margate, PCIA wrote:

> [I]t is unclear to us why the City would attempt to make a distinction in its ordinance between 'wireless communications facilities' and 'wireless broadband facilities.' The provision seems fraught with problems, and we are not sure what if anything the City gains by making this distinction.
>
> While the City attempts to delineate the two facilities through the definition section, in practice, the distinction is highly problematic. The elements of what distinguishes "broadband" service from communications service are dynamic and relatively arbitrary—it is infeasible for the City to constantly make a determination regarding whether a particular service offering meets an undefined set of criteria to qualify that service as 'broadband.' Additionally, the particular type of service that a wireless provider may be offering at a site is proprietary, and the City should not require it to be disclosed.
>
> This provision puts the City in the position of making a determination whether to approve or deny an application for a wireless facility (either communication or broadband) based in part on the type of service, and may also runs the risk of applying a different standard of review for both services. This would potentially put the City in a position to be challenged for violation of the Telecommunications Act of 1996 for discriminating among functionally equivalent services. Again, we urge the City to strike this entire section to ensure that it does not violate federal law. Letter from PCIA – The Wireless Infrastructure Association and the Florida Wireless Association to Joseph Varsallone, Mayor of Margate Florida (Feb. 14, 2011) (on file with PCIA).

PCIA did not oppose a streamlined process, but aired legitimate concerns about the ambiguity of the proposed ordinance language.

[58] Press Release, Another Georgia government turns to CH2M HILL for revenue services, Jan. 3, 2011, *available at* http://www.omiinc.com/news/releases/2011/01-03-11_Hinesville.html (last visited); Patrick Fox, *Milton suspends annual cell tower fees*, ATLANTA JOURNAL-CONSTITUTION, *available at* http://www.ajc.com/news/north-fulton/milton-suspends-annual-cell-1002815.html (last visited Sept. 30, 2011)

outreach – which can include providing jurisdictions with a model wireless facility siting ordinance,[59] a "Wireless 101" presentation detailing the various types of wireless infrastructure solutions and how they work, and edits and commentary on how to improve an ordinance – is to strike a balance between the interests of jurisdictions and the need for wireless infrastructure. The resulting successes of PCIA's outreach and educational efforts underscore the broad benefits of potential FCC best practices and educational outreach.

2. Consultants Who Claim to Specialize in Wireless Facility Siting Contribute to an Adversarial Atmosphere in the Permitting Process.

As the President, Congress and the Commission launch initiatives to hasten the delivery of broadband to all Americans,[60] cooperation between federal, state and local governments and the wireless industry becomes essential. Again, as Chairman Genachowski remarked, "In our country we overwhelmingly rely on the private sector to build out our broadband infrastructure, and that's the right course."[61] As noted above, the industry strives to work with jurisdictions in the build out of wireless networks that their citizens and businesses demand.[62]

During the continued build out of next generation networks, the wireless industry has had many interactions with consultants. In fact, it is nearly impossible to upgrade existing nationwide networks or build new nationwide networks without interacting with a consultant.[63] In some

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[59] PCIA Comments at Appendix A.

[60] *See supra* Section I.

[61] Sept. 27, 2011 Chairman Remarks at 6.

[62] *See supra* page 19-20.

[63] PCIA comments at 23; AT&T Comments at 4

cases, consultants worked cooperatively with the industry.[64] But, when a consultant touts their ability to stop all wireless deployment, the industry takes pause, and so should the Commission.

For example, the City of Calabasas, California recently enacted a moratorium on wireless facility applications while it revises its wireless facility siting ordinance. Concurrently, the Communications and Technology Commission, whose purpose is "to act in an advisory capacity to the City Council in various matters relating to the City's cable television franchises and telecommunications issues,"[65] recommended that the City Council hire a consultant whose web address is www.anticelltowerlawyers.com.[66]

Similarly, another consultant claims that they "help local officials actually *require* the use of County or Municipal owned property to open opportunities for new and increased revenue."[67] Such a requirement raises numerous concerns over a wireless provider's ability to design its network through either siting a new facility in the location best suited to address coverage or capacity issues or collocating antennas on the most practical site. Further, other commenters in the proceeding utilized a consultant who notes "the industry's reasons [for build out] are based on coverage . . . a fabricated concept, designed to change at the whim of the carrier."[68]

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[64] *See generally* Reply Comments of City of Wichita, Kansas, WC Docket No. 11-59, *Notice of Inquiry* (filed September 1, 2011) ("Wichita Reply Comments"). While Wichita retained the use of consultant, the comment process between the city and the wireless industry was cooperative.

[65] Communications & Technology Commission, City of Calabassas, *available at* http://www.cityofcalabasas.com/commissions/communications.html (last visited Sept. 29, 2011).

[66] Arin Mikailian, *N.Y. Attorney Is Panel's Choice to Review New Cell Tower Ordinance*, CALABASAS PATCH, Sept. 1, 2011, *available at* http://calabasas.patch.com/articles/ny-attorney-could-review-new-cell-tower-ordinance.

[67] Center for Municipal Solutions Consultants, *available at* http://www.telecomsol.com/home.html (last visited Sept. 29, 2011); *see also* AT&T Comments at FN 27.

[68] *Compare* Comments of City of Medina, WC Docket No. 11-59, *Notice of Inquiry* (filed July 18, 2011) ("Medina Comments") and Comments of City of Bothell, WC Docket No. 11-59, *Notice of Inquiry* (filed July 18, 2011) (continued on next page)

In sum, many consultants brand their services as capable of halting and diverting the deployment of the wireless services. In the absence of guidance from the FCC, jurisdictions will embrace what consultants are selling rather than work with industry. But as CTIA notes, "[r]ather than interject a municipal consultant into a local zoning proceeding, the local zoning authorities could turn to the expert federal agency – the FCC."[69]

C. The *Shot Clock Ruling* Can Be Circumvented, Including Through Moratoria and Determinations that Applications are Incomplete.

As PCIA and The DAS Forum and other commenters recognize, the *Shot Clock Ruling* has made a positive impact on wireless facility siting. Although it is difficult to document the breadth of that impact, the *Shot Clock Ruling* laid the groundwork for many of the necessary actions the industry recommends the Commission take to further facilitate broadband deployment. And yet, further action is necessary because jurisdictions are still able to circumvent the *Shot Clock Ruling*.

Local jurisdictions often use moratoria on wireless facility applications to "wait out" particular applications that they do not wish to address, especially considering the timelines set forth in the *Shot Clock Ruling*. The record in this proceeding demonstrates that moratoria are not used solely for their intended purpose of revising wireless facility siting ordinances and can be extended nearly *ad infinitum* to serve as an effective prohibition on service.[70] For example, the

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("Bothell Comments") *with* Clients, PlanWireless.com, *available at* http://www.planwireless.com/index.htm (last visited Sept. 29, 2011) and Seattle Times Eastside Bureau, Tower Moratorium Extended To June 2, SEATTLE TIMES, FEB. 25, 1998, *available at* http://community.seattletimes.nwsource.com/archive/?date=19980225&slug=2736380.

[69] CTIA Comments at 31.

[70] AT&T Comments at 15; Reply Comments of El Cerrito, CA, WC Docket No. 11-59, *Notice of Inquiry* (filed July 18, 2011) ("El Cerrito Reply Comments"); NextG Comments at 10; *see also* Moreland Mayor Casts Rare Vote to Break Tie, The NEWNAN TIMES HERALD, June 23, 2011, *available at* http://www.times-herald.com/Local/Moreland-mayor-casts-rare-vote-to-break-tie--1706054.

City of El Cerrito, California extended its wireless facility moratorium, which will continue the bar on all new facility deployment for a total of two years (assuming another extension is not enacted).[71] Jurisdictions across the country utilize moratoria to address concerns with their current siting ordinances, but extensions beyond six months – let alone two years – evolves beyond a revision exercise into an effective ban.[72]

Another loophole in the *Shot Clock Ruling* raised in the comments is the use of determination of wireless facility siting application completeness to toll the Shot Clock.[73] Jurisdictions often claim that the Shot Clock does not start until the application is deemed complete. As AT&T notes, jurisdictions "often require applications to be re-filed based on supposed technical infirmities, and then contend that this re-filing restarts the Shot Clock."[74] This determination allows jurisdictions to toll the Shot Clock with additional and often expensive information requests.[75]

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[71] *See generally* El Cerrito Reply Comments. As El Cerrito's Ordinance applies, the moratorium on facilities that require a conditional use permit is a moratorium on *all* new wireless facilities. El Cerrito Municipal Code Sec. 19.28.050. *Cell Tower Moratorium Extended to Study New Technologies*, ABOVE GROUND LEVEL, *available at* http://www.agl-mag.com/newsletter/AB_051711_Cerrito_Moratorium.htm.

[72] *See* Federal Communications Commission, Local and State Government Advisory Committee, Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process, *available* at http://transition.fcc.gov/statelocal/agreement.html; *see also NOI*, 26 FCC Rcd at 5396 ¶ 37.

[73] AT&T Comments at 19.

[74] *Id.* at 14.

[75] PCIA Comments at 22-23 (noting other reported application requirements and information requests including propagation studies, engineering reports, drainage studies, and inventories of other wireless facilities within the jurisdiction); AT&T Comments at 15, FN 21 (describing a process by which an applicant is provided with a lengthy list of alternative site and must demonstrate why each is not appropriate).

D. DAS and Other Infrastructure Solutions Are Subject to Inconsistent and Discriminatory Permitting Processes and Fees.

1. DAS is a Crucial Part of the Wireless Infrastructure Ecosystem.

DAS plays a critical role in the build out of wireless services, including mobile broadband in hard to reach areas and in strengthening network capacity.[76] Today, consumers demand consistent wireless broadband coverage across every setting including in the home, office and public spaces. To meet this demand highly localized service with adequate network capacity is crucial.[77] DAS is a deployment-ready solution that is perfectly positioned to timely and efficiently meet the goals of a high-speed and robust wireless broadband network. Further, DAS can also facilitate competition and lead to lower end-user costs and increased industry innovation.[78] For example, new wireless carriers entering a market with limited spectrum resources will likely need larger, more comprehensive DAS coverage and require rapid, predictable time-to-market to compete.[79] However, despite these benefits, ordinances and statutes across the country have not been updated to reflect current communications technologies or innovative development practices and result in hindered wireless broadband rollout.[80]

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[76] NextG Comments at 1-2.

[77] NextG Comments at 2.

[78] PCIA Comments at 27.

[79] *Id.*

[80] NextG Comments at 16.

2. Access to Public Rights of Way Is a Significant Challenge for DAS Deployment.

DAS networks are inherently different from the traditional infrastructure of earlier wireless networks.[81] DAS providers rely on the utilization of public rights of way in order to provide coverage to a specific area. A DAS system can include aerial or underground wiring connecting antenna nodes, and related equipment in the public rights of way including attachment to third party-owned utility poles or municipal-owned structures and infrastructure, such as street lights or traffic lights. While many localities' right-of-way policies are reasonable, "a number of localities abuse their authority over public rights-of-way, which thus impedes broadband deployment."[82]

Section 253 of the Communications Act[83] was designed to limit instances in which local governments impose excessive, discriminatory, unfair and/or unbalanced fees and other terms of access for the use of the public rights of way where there is little or no relationship to the actual cost of managing the public rights of way.[84] Specifically, Section 253 "prohibits state and local policies that impede the provision of telecommunications services while allowing for rights-of-way management practices that are nondiscriminatory, competitively neutral, fair and reasonable."[85] The intent of the section is to balance the national goals of increased competition

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[81] *Id*. at 17.

[82] Verizon Comments at 16.

[83] 47 U.S.C. § 253.

[84] Comments of CenturyLink, WC Docket No. 11-59, *Notice of Inquiry*, at 2 (filed July 18, 2011).

[85] *See* CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 113, Recommendation 6.6 (Mar. 2010) ("NBP" or "Plan").

and to encourage the deployment of advanced services with the local and historical management interests.[86]

However, the practices of many local jurisdictions hinder and delay access to public rights of way needed to expand broadband capacity and coverage.[87] When a locality makes it more difficult to deploy broadband, either through high right-of-way registration, or other fees, or onerous application, inspection, bonding or indemnity requirements, it makes it more expensive to deploy broadband facilities.[88] In turn it is "less likely that providers will build such facilities in the area" and "[i]n some cases, providers may have little choice [but] to leave the market and must accede to local demands, thus diminishing financial resources that could have been used to improve service or deploy new facilities elsewhere."[89]

For example, AT&T cites its experience in Mountain View and Los Altos, California where the local jurisdictions have taken the position that AT&T cannot place antennas on a pole-top extension extending a few feet above existing utility poles.[90] The cities contend that the antennas would violate the residential height restriction even though there is no such restriction in the public rights of way, and normal zoning requirements do not usually extend to public rights of way.[91] In Oakland, California, a new utility pole with wireless attachments is characterized as a "monopole," subject to macro-cell siting requirements including setback, screening and landscaping - requirements that are not practically possible to conform to for

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[86] *See, e.g., Puerto Rico Telephone Co. v. Municipality of Guayanilia*, 450 F.3d 9, 15 (1st Cir. 2006).
[87] AT&T Comments at 5.
[88] Verizon Comments at 16.
[89] *Id.*
[90] AT&T Comments at 17.
[91] *Id.*

antennas on utility poles in the public rights of way.[92] These impediments to the public rights of way slow broadband deployment and obstruct the industry's efforts to improve service and continuity.

3. The Process for Obtaining Zoning and Other Approvals Can Lead to Significant Delays and Fees, Despite the *Shot Clock Ruling*.

i. DAS Deployment Delays

Too often DAS providers are subject to local processes for permitting that are poorly defined or do not provide timely review of permits.[93] This lack of clarity for the permitting process "makes it very difficult for companies . . . to gauge construction and deployment timelines."[94] "The end result is thwarted investment because companies . . . cannot construct wireless broadband networks on time or their proposals are rejected during project awards because they cannot provide firm cost and time parameters."[95]

Further, even when DAS providers take steps that should ensure a smooth permitting process, localities erect additional hurdles. DAS provider NextG notes in their comments that in certain jurisdictions, despite acquiring state-level regulatory status which should exempt the firm from most local permitting schemes like other CLECs, ILECs, and similar users of the public rights of way, it is not exempted.[96] Additionally, DAS permitting often does not account for the entire system, causing significant delays in deployment. Many jurisdictions require individual applications for each antenna within a DAS network, rather than allowing all nodes within the

[92] NextG Comments at 17.

[93] *Id*. at 5.

[94] *Id*. at 6.

[95] *Id*.

[96] *Id*. at 5.

system to be combined into a single application.[97] This procedure increases the costs of deployment exponentially.[98]

ii. The *Shot Clock Ruling* and DAS

Despite the applicability of the *Shot Clock Ruling* to DAS deployments, the lack of clarity or consensus about the decision has caused significant delays and uncertainty in the rollout of broadband services. As PCIA and The DAS Forum demonstrated, jurisdictions are declining to follow the *Shot Clock Ruling's* requirement that a state or local government act on a wireless facilities siting request within 150 days for siting applications other than collocations when processing a DAS application.[99] Further, the ruling's omission of what constitutes a "complete application" for the purposes of triggering the timeline has created a loophole that allows jurisdictions to keep applications open for indefinite periods of time, failing to begin the timeline.[100]

Misinterpretation of terms has created barriers to deployment of DAS. In Arizona, the City of Scottsdale's reply comments incorrectly interpret PCIA and The DAS Forum's initial filing[101] claiming that DAS is a wireless service.[102] However, the statement they cite does not say that a neutral host DAS company provides wireless service. Rather, it says that the antennas in a DAS deployment are used to provide wireless service. DAS deployments provide facilities that

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[97] *Id*. at 17.

[98] *Id*. at 17-18.

[99] PCIA Comments at 13.

[100] *See Shot Clock Ruling*, 24 FCC Rcd at 14010 ¶ 42.

[101] PCIA Comments at 13, n.56.

[102] Reply Comments of City of Scottsdale, WC Docket No. 11-59, *Notice of Inquiry* at 3 (filed Sept. 1, 2011) ("Scottsdale Comments").

are used to provide CMRS or "wireless" service. Therefore, the *Shot Clock Ruling* applies because Section 332(c)(7) applies to local decisions regarding the siting of wireless "facilities."

iii. Unreasonable Fees

As Level 3 stated in their comments, "The uncertainty around network infrastructure and access costs not only deters new entrants to the market, but also leads to an accelerating incremental decrease in broadband investment nationwide as municipalities and cities impose situational monopoly fees on captive providers."[103] A number of local governments have recognized that communications and broadband services are necessary to encourage economic development and have therefore allowed communications providers access to the public rights of way for a one-time permit charge or similar fees limited to recovering the cost of management and maintenance.[104] However, "[a]ll too often, it appears that state and local entities use the right-of-way process simply as a raw revenue generation tool: in many cases, there is simply no connection at all between the fees charged and the impact or burden that the right-of-way usage creates."[105] Regrettably, many government entities "appear to give much higher – and shortsighted – priority to revenue generation than to expanding broadband deployment for the long-term benefit of their residents."[106]

The record showcases numerous examples of exorbitant fees associated with DAS deployments in the public rights of way. CenturyLink cites a Texas Municipal League report that states "right-of-way rental fees constitute nearly ten percent of many Texas cities' general

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[103] Comments of Level 3 Communications, WC Docket No. 11-59, *Notice of Inquiry* at 2 (filed July 18, 2011) ("Level 3 Comments")

[104] CenturyLink Comments at 5.

[105] Level 3 Comments at 15.

[106] *Id*.

revenues . . .."[107] In San Mateo County, California the permit fee per node is $10,326, roughly half the cost of the equipment involved in the most basic node installation.[108] The City of Mountain View, California has taken the position that it must have a new ordinance specific to DAS and has required $30,000 just to file an application.[109] Fees such as these fly in the face of the NLC's assertion that "[l]ocal right-of-way practices add little to overall construction costs."[110]

NextG stated that in some instances "the fees appear to be thinly-veiled taxes on wireless services and are seemingly set at levels to discourage companies from seeking to deploy services in the jurisdiction."[111] While NextG states that they are "not opposed to paying reasonable and lawful public right of way occupancy fees," they are often met with cities that "impose exorbitant fees for the processing of permit applications which in many instances exceed the price of any other permit application fees within a municipality."[112] Further, the fees assessed on DAS providers are not congruent with the size of the installation, "charg[ing] carriers deploying relatively small facilities within the public right of way the same rate charged for the use of private property to site tall towers."[113] The extreme range in fees associated with deployment of

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[107] CenturyLink Comments at 5, *citing* FCC Appoints Task Force To Study Right-Of-Way Rental Fees, Texas Municipal League, *available at* http://www.tml.org/leg_updates/legis_update040610c_rightofway.asp (last visited Sept. 29, 2011).

[108] NextG Comments at 13.

[109] AT&T Comments at 17.

[110] NLC Comments at 8.

[111] NextG Comments at 14.

[112] *Id*. at 16.

[113] *Id*.

broadband infrastructure in the public rights of way creates market uncertainty and ultimately deters investment and expansion.[114]

PCIA and The DAS Forum are alarmed by evidence of regional upward trends for telecommunications fees in the public rights of way. For example, Level 3 notes a curious example where compensation methodology or fees imposed by one government entity are "strikingly similar to the methodology or fee imposed by another in the same geographic region."[115] Level 3 posits that this resemblance "suggests either that the governmental entities are coordinating their compensation practices or that there is a 'domino effect' where governmental entities within a state or region learn of each others' right-of-way compensation practices and develop their own practices accordingly."[116] Commenters state that this "coordination" has only seen prices moving together in an upwards direction and as a result, increase the cost of deployment to the highest price charged by a state or local government within a region.[117]

DAS networks should be treated as any other telecommunications facility in the public rights of way. Incongruent regulations and attempts to treat DAS differently unduly increase costs delaying or otherwise preventing deployment of wireless broadband services.

E. FCC Environmental and Historic Preservation Rules Do Not Account for DAS Deployment's Unique Use of the Right of Way.

In addition to the delays and the fees discussed above, outdated FCC environmental and historic preservation rules hinder the deployment of DAS networks. Delays due to environmental and historic reviews for both collocations and new builds can run anywhere from four months to

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[114] Level 3 Comments at 3.

[115] *Id*. at 9.

[116] *Id*. at 9.

[117] *Id*. at 9.

a year.[118] However, while the Commission has negotiated a streamlined procedure to obtain clearance under the environmental rules, the rules do not apply to newer technologies like DAS.[119] The rules in place today "were developed in 2001 when smaller cell deployments, like DAS and repeater systems, were not common, and are not suited to processing through the Collocation Nationwide Programmatic Agreement process."[120] As AT&T commented, "DAS and repeater deployments on buildings and other structures, including outdoor DAS deployments on street poles, utility poles, or traffic poles, create minimal impact on the surrounding environment due to their low visibility."[121] To require Section 106 review for those deployments is inefficient and time consuming and often results in delayed broadband deployment.[122]

III. THE RECORD REFLECTS THAT FCC ACTION IS NECESSARY TO ACCELERATE BROADBAND BUILD OUT AND INVESTMENT.

The record confirms that immediate Commission action is needed to remove barriers to the efficient use of existing wireless facilities and the deployment of necessary additional facilities. As discussed below, the Commission should issue interpretative rules to clarify longstanding ambiguities in the Communications Act, proceed with a new, shorter "*Shot Clock*" rule, engage and pursue best practices and regulatory solutions to facilitate DAS developments, adapt the NEPA and Section 106 of the NHPA to changing technologies, engage in outreach among government entities to address barriers to broadband deployment, and formally request

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[118] AT&T Comments at 21.

[119] National Historic Preservation Act of 1966, 16 U.S.C. § 470f (2006); *See* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, *available at* http://wireless.fcc.gov/releases/da010691a.pdf; *Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, Report and Order, FCC 04-222, WT Docket No. 03-128, App. B (rel. Oct. 5, 2004).

[120] AT&T Comments at 23.

[121] *Id*. at 23.

[122] *Id*. at 23.

that Congress adopt legislation to permit collocations "by right" without discretionary review by a state or local government.

A. Immediate Commission Action is Needed to Remove Barriers to the Efficient Use of Existing Wireless Facilites and the Deployment of Necessary Additional Facilities.

1. The Commission Should Issue Interpretative Rules to Clarify Longstanding Ambiguities in the Communications Act.

i. The FCC Should Issue a Rule Interpreting Sections 253 and 332(c)(7) That Prohibits the Denial of New Requests to Collocate On a Structure Where Another Provider is Already Located.

The FCC should issue a rule interpreting Sections 253 and 332(c)(7) that prohibits the denial of new requests to collocate on a structure where another provider is already located. As Verizon and CTIA recognize in their initial comments, the onerous application requirements associated with the regulation of wireless facilities, which is detailed above and throughout the record, inhibit efficient collocation.[123] An FCC rule that prohibits the denial of new collocation requests on existing collocated structures would further the national goals of ubiquitous wireless broadband and streamline the process for collocations.[124]

As PCIA and The DAS Forum discussed in its comments, the re-review of a permitted underlying facility designated "legal, non-conforming" status under the zoning process is a significant problem that hinders the ability of wireless providers to efficiently utilize existing infrastructure. The Commission should find that such denials to collocate on such sites are

[123] Verizon Comments at 7-8; CTIA Comments at 33.

[124] Verizon Comments at 9-10.

"unreasonably discriminate[ory]" under Section 332(c)(7)(B)(i)(I).[125] The rule should prescribe that the preclusion of later collocators, including where a previously legal site with one or more providers is now non-conforming given changes in zoning laws since the underlying structure was built, is discriminatory under Section 332(c)(7), barring demonstrable safety concerns, such as tower overloading. Additionally, the FCC should prescribe that it is discriminatory to subject later collocators to more onerous, complex and costly application requirements than existing collocations. Further, the FCC should also find that any such denials "have the effect of prohibiting" the provision of telecommunications services under Section 253(a) and personal wireless services under Section 332(c)(7)(B)(i)(II).

ii. The FCC Should Issue a Rule that Consideration of Technical or Operational Justifications for a Wireless Facility or the Type of Wireless Deployment Is Preempted by Federal Law.

As stated in our original comments,[126] the FCC should issue a rule that consideration of technical or operational justifications for a wireless facility or the type of wireless deployment is preempted by federal law. [127] While some circuits have already found technical or operational considerations to be preempted,[128] an FCC rule would assure national certainty. Wireless networks are inherently national and international, not local. Further, the FCC can provide the resources, technical knowledge, and experience that localities cannot. Such a rule would ensure

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[125] *MetroPCS N.Y., LLC v. City of Mt. Vernon*, 739 F. Supp. 2d 409, 423 (S.D.N.Y. 2010) ("*MetroPCS*").

[126] PCIA Comments at 55-56.

[127] *See NOI*, 26 FCC Rcd at 5397 ¶ 47.

[128] *See, e.g., N.Y. SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97, 105-06 (2nd Cir. 2010) ("*Clarkstown*") ("Federal law has preempted the field of the technical and operational aspects of wireless telephone service, and there is 'no room' for … provisions … that give a preference to [particular technologies]."); *Bastien v. AT&T Wireless Servs., Inc*., 205 F.3d 983, 989 (7th Cir. 2000) (The FCC is "responsible for determining the number, placement and operation of the cellular towers and other infrastructure.").

that local zoning authorities without the requisite expertise could not undermine legitimate technological and operational decisions that impact the national and international network. [129]

iii. The FCC Should Issue a Rule Interpreting the "Prohibitions" Under Section 253 to Allow Facial Challenges to State or Local Siting Regulations.

The FCC should issue a rule interpreting the "prohibitions" under Section 253 to allow facial challenges to state or local siting regulations.[130] As PCIA and The DAS Forum stated in its initial comments, the conflict among the federal courts could effectively preclude *any* facial challenge to unlawful right of way restrictions under Section 253(a).[131] The record evidences the industry's concern regarding the role that this confusion could play in inhibiting wireless infrastructure deployment.[132] Although comments on the record featured other solutions,[133] CenturyLink agreed with PCIA and The DAS Forum that the Commission should proceed with a rulemaking to clarify the interpretation of "prohibitions" under Section 253.[134] A Commission rule reaffirming the traditional view and permitting challenges to state or local regulations based on possible prohibition is therefore needed, so that providers may challenge overly burdensome

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[129] *See id.* at 106 ("While section 332(c)(7) 'preserves the authority of State and local governments over zoning and land use matters,' … this authority does not extend to technical and operational matters, over which the FCC and the federal government have exclusive authority.").

[130] *See NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

[131] *See, e.g., P.R. Tel. Co.*, 450 F.3d at 9; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004)); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 481-84 (N.D. N.Y. 2003); *XO Mo., Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 996-98 (E.D. Mo. 2003). *See also Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007) (emphasis in original); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) ("*Sprint Telephony*").

[132] Verizon Comments at 30; Minnesota Coalition of Cities Comments at 8 (Noting that Minnesota has had far fewer cases commenced regarding this issue under the Telecommunications Act, or appealed to the Eighth Circuit than many other state); CenturyLink Comments at 17-20; PCIA Comments at 56-57.

[133] Verizon Comments at 30 (arguing that the Commission already decided that § 253 preempts local actions that materially interfere with any carrier's ability to enter and compete fairly in the telecommunications market).

[134] CenturyLink Comments at 17-20.

and prohibitory regulations without having to first waste time and resources filing an application that has no possibility of favorable consideration.[135]

iv. The FCC Should Amend Its Rules to Provide that Fees Not Related to Costs Are Presumptively Unreasonable.

The Commission should amend its rules to provide that fees not related to costs are presumptively unreasonable.[136] As detailed above, too often jurisdictions, and the consultants they have retained, have used the fees associated with siting in the public rights of way as short-term profit centers. Accordingly, the rules should make clear that any fee that exceeds a municipality's legitimate costs of processing a right-of-way or wireless siting application and making access available, including reasonable maintenance thereof will be presumed to be (i) not "fair and reasonable"[137] and (ii) "have the effect of prohibiting" the provision of telecommunications and personal wireless services. Approaching the fee issue on a case-by-case basis does not foster the type of predictable and consistent regulatory environment necessary to encourage investment in broadband deployment.

v. The FCC Should Issue a Rule that Prohibits Moratoria in Particular Geographic Areas or Lasting Longer than Six Months.

The Commission should remind states and localities of the six-month limit on siting moratoria in the joint industry-community agreement. As discussed above and detailed in PCIA and The DAS Forum's comments, moratoria significantly delay the siting of wireless

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[135] PCIA Comments at 56-57.

[136] *Cf. MetroPCS*, 739 F. Supp. 2d at 424-27 (finding the collection of over $16,000 in consultant fees to be unreasonable under state law, and ordering disgorgement of fees relating to "repeatedly requesting unnecessary information and belaboring issues already resolved"); *see also NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

[137] *See P.R. Tel. Co.*, 450 F.3d at 22 ("[F]ees should be, at the very least, *related* to the actual use of rights of way and … 'the costs [of maintaining those rights of way] are an essential part of the equation.'") (citation omitted).

infrastructure and ultimately the rollout of broadband wireless services. Many jurisdictions since the enactment of the *Shot Clock Ruling* have used moratoria to avoid the intent of the ruling altogether. Therefore, the FCC should emphasize that a moratorium that extends longer than six months is contrary to the 1998 industry-community agreement and can adversely affect the rollout of broadband.

Furthermore, wireless facility regulations frequently wholesale exempt certain types of zoning districts from wireless siting.[138] Often these are residential districts and light commercial districts. Such zoning bans cause significant problems as businesses and households continue to choose wireless over wireline and network operators must address the need to provide sites for mobile broadband services closer to end users. Additionally, even small areas closed off to wireless facilities can foreclose on capacity sites. The Commission should work with local jurisdictions to address geographic moratoria.

vi. The FCC Should Issue a Rule that Ordinances Establishing Preferences for the Placement of Wireless Facilities on Municipal Property Are Unjustly Discriminatory.

Jurisdictions continue to draft ordinances establishing preferences for placing wireless facilities on municipal property.[139] These "preferences" become mandates by establishing high hurdles to pursuing non-municipal siting options.[140] PCIA and The DAS Forum recognize the value of effectively utilizing municipal property, especially when siting facilities to bring coverage and capacity to residential and commercial areas with minimal visual impact.

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[138] *See generally* Comments of City of Battle Creek, Michigan, WC Docket No. 11-59, *Notice of Inquiry* (filed July 18, 2011) ("Battle Creek Comments").

[139] AT&T Comments at 16.

[140] See PCIA Comments at 35-36.

Municipal property is often located in central locations that can maximize the wireless facilities potential to deliver services to the greatest number of consumers and businesses.

However, in establishing a "preference" for municipal property, jurisdictions raise the regulatory hurdles for the use of private property rather than incentivize its use. For example, jurisidictions often require wireless providers to go through the lengthy and costly process of proving that all municipal property is unsuitable for the wireless facility.[141] PCIA and The DAS Forum reiterate that such preferences are discriminatory to new wireless entrants under Section 332 as they will be disadvantaged by the lack of flexibility for siting options from which current providers benefited.[142] Municipal property preferences make it more difficult for new entrants to build out their functionally equivalent services. These preferences complicate the siting process on private property, effectively compelling wireless providers to site on municipal property. The Commission should therefore issue a rule that ordinances establishing preferences for the placement of wireless facilities on municipal property are unreasonably discriminatory and are therefore precluded under Section 332(c)(7).[143]

2. The FCC Should Proceed with a New, Shorter "Shot Clock" Rule for Collocations on Existing Structures with a "Deemed Granted" Remedy.

As presented in our initial comments[144] and reflected on the record by other commenters,[145] the Commission should "proceed with a new, shorter 'shot clock' rule for co-

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[141] Comments of CityScape Consultants, Inc., WC Docket No. 11-59, *Notice of Inquiry*, at 2 (filed July 18, 2011) ("CityScape Comments"). ("Generally, if an applicant can demonstrate that a public site is unsuitable for its network deployment, it is free to pursue a facility on private property.").

[142] PCIA Comments at 43-44.

[143] *See NOI*, 26 FCC Rcd at 5397-98 at ¶¶ 47-48.

[144] PCIA Comments at 40.

locations."[146] AT&T detailed in its initial comments why the Shot Clock has not achieved its goals actions to circumvent it by local authorities, such as by requiring applications to be re-filed based on supposed technical infirmities or rejecting sites with the promise of considering another nearby site or on frivolous or illegal grounds, only to create delays that the localities they argue are not technically Shot Clock violations.[147]

Because states and municipalities do not agree to expedite collocation approvals and "by right" legislation is still pending at the national level, the Commission should adopt a 45-day period for reviewing collocations applications, as originally proposed in the "Shot Clock" petition.[148] In its *Shot Clock Ruling*, the Commission did not dispute data showing that action on collocation applications is often rendered in as little as one day in many localities. [149] However, the ruling did express concern that a 45-day timeframe might be "insufficiently flexible" for unique circumstances, such as cases where more time is needed "to explore collaborative solutions among the governments, wireless providers, and affected communities."[150] Given that many collocation applications "can and perhaps should be processed" within 45 days, the current 90-day limit is not warranted for the few unique cases where more time may be needed. For

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[145] *See, e.g.,* AT&T Comments at 19-20.

[146] *See* Technical Advisory Council, Technology Policy Recommendations to Spur Jobs, Innovation, at 2 (Apr. 22, 2011) ("TAC Report"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306065A1.pdf. (The Technical Advisory Council, or "TAC," is charged with identifying ways to use communications technologies and spectrum to drive job creation and economic growth); *see also NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

[147] AT&T Comments at 14.

[148] *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, at 24-25 (July 11, 2008) ("Shot Clock Petition").

[149] *Id*.

[150] *Id*.

example, when the Shot Clock cut-off window for collocations can be extended by mutual consent of the applicant and the state or local government.[151]

Accordingly, the FCC should adopt a shorter 45-day "Shot Clock" rule for collocations on existing structures. Doing so is fully consistent with prior Commission pronouncements in this area: "Collocation applications are easier to process than other types of applications as they do not implicate the effects upon the community that they may result from new construction. Specifically, the addition of antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community.[152]

B. The Commission Should Engage and Pursue Best Practices and Regulatory Solutions to Facilitate DAS Development.

As noted above, DAS and other infrastructure solutions are subject to inconsistent and discriminatory permitting processes and fees, which unnecessarily impede wireless broadband deployment. While DAS networks fundamentally provide a wireline transport service that therefore is subject to traditional regulation by state public utilities commissions, "jurisdictions frequently subject DAS providers to radically different, more time consuming, expensive, and discretionary processes typically under the guise of "zoning" than are imposed on other public right of way occupants."[153]

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[151] *Id*. at 14013 ¶ 49.

[152] *Shot Clock Ruling*, 24 FCC Rcd. At 14012 ¶ 46.

[153] NextG Comments at 2.

1. The FCC Should Clarify Federal Law to Set out Clear, Uniform Processes and/or Standards for Accessing Public Rights of Way to Install DAS Facilities.

The Commission should clarify federal law and set clear standards for accessing public rights of way to install DAS facilities, or at minimum encourage states to adopt similar legislation.[154] PCIA and The DAS Forum are encouraged by instances on the record where jurisdictions are adopting similar stances to the ten suggested for model legislation/best practices regarding DAS deployment highlighted in our initial comments.[155]

For example, NextG recounted their experience in the Township of Lower Merion in Pennsylvania in their comments.[156] Lower Merion's ordinance accounts for and differentiates micro wireless facilities from traditional macro sites.[157] Because of "the guidance of a clear ordinance and assistance of the Planning Director, NextG was able to quickly ascertain the municipal requirements to build its facilities."[158] A hearing was scheduled within a month regarding NextG's thirty-five node systems, resulting in "a significant savings when compared with other jurisdictions" where the wait has ranged from "many months or years . . . for significantly smaller DAS networks."[159]

The City of San Jose, California has a right of way ordinance that also provides a clear way forward for municipal approval of DAS node attachments.[160] This ordinance treats all

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[154] PCIA Comments at 44.

[155] *Id.* at 45 (listing several recommendations for inclusion in best practices).

[156] NextG Comments at 30.

[157] Lower Merion Code, Chapter 155-141.1.1, Wireless Communications Facilities, *available at* http://www.lowermerion.org/Attach/chapters/chap155.html.

[158] NextG Comments at 30.

[159] *Id.*

[160] *Id.* at 30 fn 35.

equipment equally, without singling out wireless facilities or providing discriminatory treatment.[161] In NextG's experience the typical processing timeline is 30 - 60 days for node attachments.[162] The ordinance does not require a hearing.[163]

PCIA and The DAS Forum also encourage the states to adopt regimes to streamline the process of granting access to the public rights of way.[164]

2. The FCC Should Clarify that the *Shot Clock Ruling* Applies to Applications for DAS Deployments.

Clarity regarding the *Shot Clock Ruling* and DAS deployments will provide certainty and speed deployment of wireless broadband. The *Shot Clock Ruling* applies because Section 332(c)(7) applies to local decisions regarding the siting of wireless "facilities." As a result, an application for a DAS network deployment should be reviewed within the 150-day timeframe "to process applications other than collocations."[165]

3. The FCC Should Educate State and Local Governments About the Nature and Benefits of DAS.

The FCC should reactivate the Federal Rights of Way Working Group, led by the National Telecommunications and Information Administration ("NTIA").[166] PCIA and The DAS Forum agree with Sacred Wind Communications, Inc. and other commenters that the reactivation of the Working Group would "serve as a forum to assess and establish best practices for federal agencies [and act] as [. . .] well as a key mediator in encouraging collaboration between private

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[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] Georgia – O.C.G.A § 46-5-1; FLORIDA STAT. ANN. § 337.401.; MICH. ADMIN. CODE § 484.3115.

[165] *See Shot Clock Ruling*, 24 FCC Rcd at 14000 ¶ 19.

[166] Comments of Sacred Wind Communications, WC Docket No. 11-59, *Notice of Inquiry* at 13 (filed July 18, 2011) ("Sacred Wind Comments").

industry, government authorities, and consumer groups, removing log jams to deployment."[167] As recommended by TAC and suggested in our initial comments, the FCC should host a "road show" or workshops highlighting best identified practices that can speed the deployment of DAS.[168]

C. Rules Implementing the National Environmental Policy Act and Section 106 of the National Historic Preservation Act Should Be Adapted to Account for Changing Technologies, Including DAS.

The Commission should categorically exclude DAS deployments from environmental processing. Additionally, as AT&T commented, the Commission can further streamline the Section 106 process through likely negotiations with tribes, the State Historic Preservation Officer ("SHPO"), and the Advisory Council on Historic Preservation to update or supplement the NPAs.[169] One such way to exclude DAS from environmental processing is to amend Note 1 to Section 1.1306 of the FCC's rules to exclude DAS deployments.[170] Note 1 currently excludes from all environmental processing the installation of aerial or underground cable or wire along existing corridors and excludes collocation of antennas from all but historic processing and RF compliance.[171] Further, as the TAC noted in the Chairman's report and CTIA noted in its comments, there are significant delays and "inconsistent and non-concurrent time frames for

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[167] *Id.*

[168] *See* TAC Report at 2.

[169] AT&T Comments at 23.

[170] *See NOI*, 26 FCC Rcd at 5397 ¶ 47.

[171] 47 C.F.R. § 1.1306(a), Note 1.

environmental assessments."[172] We agree that the process can be improved, at minimum, through the devotion of additional resources as an "important first step in reducing avoidable delays."[173]

DAS systems are the same type of equipment that the intent of Note 1 would cover. As described above, DAS systems are a series of antenna nodes strung across utility poles, or light posts along the public rights of way and daisy chained with fiber optic cable. The visual impact of DAS nodes is minimal. As the FCC has recognized DAS sites "are not visible beyond the immediate vicinity" and "may be particularly desirable in areas with stringent siting regulations, such as historic districts."[174] The unique characteristics of DAS systems necessitate the FCC's consideration of how its NEPA and historic review processes impact DAS and other evolving telecommunications technologies. As AT&T commented the existing review processes "were developed in 2001 when smaller cell deployments, like DAS and repeater systems were not common, and are not suited to processing through the Collocatoin NPA process."[175] PCIA and The DAS Forum join with AT&T when they state "[a] failure to resolve these problems creates a potential for delayed facility deployment and will result in the expenditure of substantial resources to clear sites that have minimal impact, with little benefit to consumers or the environment."[176]

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[172] TAC Report at 2; CTIA at 35.

[173] CTIA Comments at 35.

[174] Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 10-133, *Public Notice*, DA 11-103 at ¶ 308 n.878 (rel. June 27, 2011) ("*Fifteenth Competition Report*").

[175] AT&T Comments at 22-23.

[176] AT&T Comments at 23.

D. The Commission Should Engage in Outreach Among Government Entities to Address Barriers to Broadband Deployment.

As highlighted in our initial comments, the Commission should take the following steps to improve the collocation siting process:

1. The FCC Should Engage in Outreach to States and Localities to Recommend the Adoption of Model Siting Ordinances and Best Practices.

The Commission should begin an extensive educational campaign to recommend that states and localities adopt model siting ordinances and best practices.[177] In our initial comments, we urged the FCC to engage in outreach to states and localities to highlight best practices for broadband wireless infrastructure deployment using model ordinances,[178]and to sponsor a "Race-to-the-Top-style awards/recognition program to identify a list of jurisdictions with the best practices in terms of broadband infrastructure deployment."[179] Both of these methods of outreach are critical for the foregoing reasons.

Given the friction among commenters on the record, it is notable that best practices were supported by stakeholders from every angle.[180] This creates an opportunity for cooperation between the industry and legislators, which can inject both predictability and fairness into the legislative process at the local level. With such tools, industry and localities have a jumping off point from which to start negotiating the unique needs of each community, without beginning the

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[177] *See NOI*, 26 FCC Rcd at 5396 ¶¶ 1.

[178] *See NOI*, 26 FCC Rcd at 5396 ¶ 39.

[179] TAC Report at 1; *see NOI*, 26 FCC Rcd at 5396 ¶ 41. For example, as discussed above, the state of Georgia has enacted the "Advanced Broadband Collocation Act," which streamlines the permitting process for collocations. *See supra* discussion Section D.1.

[180] *See, e.g.*, Doral Comments at 1; Montgomery County Comments at 13; NYC Department of Information Technology and Telecommunications Comments at 3-4, 13-14; American Public Works Association Comments at 3; Verizon Comments at 39; PCIA Comments at 44-51.

process with hostility. Therefore, the FCC should engage in outreach to states and localities to recommend the adoption of model siting ordinances and award jurisdictions that employ siting best practices.

2. The FCC Should Engage in Outreach to Congress and the Executive Branch to Improve Access to Federal Lands and Buildings.

One immediate step the Commission can take to facilitate the build out of wireless broadband is to work with Congress and the Executive Branch to improve access to both federal lands and federal buildings. The National Broadband Plan first suggested that Congress and the Executive Branch work to lower costs and expedite the deployment of broadband facilities.[181] In recent bills, Congress attempts to respond to that suggestion. The bi-partisan Reforming Airwaves by Developing Incentives and Opportunistic Sharing ("RADIOS") Act would require, among other things, the General Services Administration ("GSA") "to allow for the installation of neutral host systems by any wireless neutral host provider upon request in all publically accessible Federal buildings."[182] The RADIOS Act also calls on the GSA to establish master contracts for wireless antenna siting on Federal buildings and uniform, inter-agency siting applications for the installation of wireless facilities on government property.[183]Another bi-partisan bill, the Public Safety Spectrum and Wireless Innovation Act ("S.911"), also seeks to act upon the recommendations of the NBP with similar recommendations on wireless facility siting

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[181] NBP at 115.

[182] S. 445, 112th Cong., § 11 (2011), *available at* http://kerry.senate.gov/imo/media/doc/03-02-11%20Snowe-Kerry.pdf.

[183] *See* S. 911, 112th Cong., (2011).

on federal property. These bi-partisan bills show that there is broad support for effectively utilizing federal property in the delivery of broadband..[184]

The Federal Government owns more than 650 million acres of land (representing nearly a third of the country's land mass) and owns or leases space in 8,600 buildings nationwide,[185] which offer tremendous potential to support all forms of wireless broadband deployment.[186] However, as recognized by CTIA, delays and difficulties associated with siting on federal land have an adverse effect on the siting timeline and disincentivizes the use of federal lands by tower owners, resulting in underutilization of those lands.[187] Commenters, such as Sacred Wind Communications, called out for the Commission to intervene in this area of the siting problem in particular, urging that a standardized process and fee program would enable build out of wireless facilities, using federal lands and buildings.[188] In addition, the TAC, in its Chairman's report dated April 22, 2011, recommended that the FCC formally request "that the President issue an Executive Order on broadband infrastructure deployment on federal land and in federal buildings. . ." which would mandate "[s]ingle document format for permitting, [s]ingle federal agency to coordinate the permit approval process, [and] [s]ixty day time frame for approvals."[189] Accordingly, as detailed in our original comments, the FCC should support legislation to improve access to federal lands and buildings for wireless facility siting and formally request that

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[184] AT&T Comments at 18, 20.

[185] *See* NBP at 115.

[186] Sacred Wind Comments at 13.

[187] CTIA Comments at 24.

[188] Verizon Comments at 14. *See also* Comments of Regional Fiber Consortium, WC Docket No. 11-59, *Notice of Inquiry*, at 6 (filed July 18, 2011) ("Regional Fiber Comments"); Doral Comments at 1; Sacred Wind Comments at 13; CTIA Comments at 24.

[189] *See* TAC Report at 2.

the President issue an Executive Order on broadband infrastructure deployment on federal land and in federal buildings.[190]

3. The FCC Should Formally Request that Congress Adopt Legislation to Permit Collocations "By Right" without Discretionary Review by a State or Local Government.

Currently, the Senate is considering a substitute amendment to S.911, the Rockefeller-Hutchison spectrum legislation, which requires states or localities to approve modifications, including collocations or the removal or replacement of transmission equipment, that do not "substantially change the physical dimensions" of wireless towers.[191] In the House, Energy & Commerce Committee Chairman Upton and Communications & Technology Subcommittee Chairman Walden circulated a discussion draft with a similar provision. This language provides necessary and narrowly-tailored relief to facilitate the expansion of wireless coverage and capacity through collocation and upgrades of existing equipment to next-generation equipment, enhancing service and facilitating competition. While the provision does not in any way impact the ability of localities to continue to closely review the land use of any proposed new wireless facility, it will address burdensome re-review of the use of a tower, allow the efficient use of existing, approved tower, and reduce cost and time of deployment of next-generation wireless facilities. PCIA and The DAS Forum urge the Commission, as the expert agency, to support Congress in its bi-partisan effort to bring broadband as quickly and efficiently as possible to the American people.

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[190] *See* TAC Report at 2; *see also NOI*, 26 FCC Rcd at 5397 ¶ 44.

[191] *See* S. 911, 112th Cong. at § 528(a) (2011).

IV. THE RECORD CONFIRMS THAT THE COMMISSION HAS AMPLE AUTHORITY TO TAKE THE ACTIONS DISCUSSED IN THE *NOI* AND RECOMMENDED BY PCIA AND THE DAS FORUM.

The record confirms that the Commission has ample legal authority to engage in educational efforts and other outreach to optimize access to public rights of way and wireless facilities siting at the federal, state and local levels.[192] Indeed, state and local representatives encourage the Commission to "focus its efforts on carefully tailored voluntary and educational efforts."[193] The record also supports Commission authority to adopt binding rules to address these issues.[194] As discussed below, the contrary statutory and constitutional arguments advanced by various jurisdictions, led by the NLC,[195] are wrong as a matter of law and should be rejected.

A. The Commission Has Authority Under The Communications Act To Take The Actions Recommended By PCIA and The DAS Forum.

PCIA and The DAS Forum, along with a number of other parties, have demonstrated that the Commission can and should issue interpretive rules that will clarify longstanding ambiguities in Sections 253 and 332(c)(7) of the Communications Act, eliminate unintended consequences of

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[192] *See, e.g.*, City of Arlington, Texas Comments at 16; City of Bellevue, Washington Comments at 9; City of Denver, Colorado Comments at 14; City of Glendale, California Comments at 5; City of Hoffman Estates, Illinois Comments at 7; CTIA Comments at 27-31; Los Angeles Country Comments at 4; Minnesota Municipalities Comments at 4-5; New York City Comments at 14; NextG Networks Comments at 28; NLC Comments at 41, 49-52; City of Portland, Oregon Comments at 21-22; SCAN Comments at 7; Tennessee County Highway Officials Association Comments at 10; Verizon and Verizon Wireless Comments at 39-41; WCAI Comments at 2-5.

[193] *See* NLC Comments at 41.

[194] *See, e.g.*, AT&T Comments at 19-20; CenturyLink Comments at 17-20; CTIA Comments at 25-27; Level 3 Comments at 3-4, 23;.

[195] *See generally* NLC Comments at 52-66. The comments of individual jurisdictions generally support and/or incorporate by reference the legal positions of NLC *et al*. *See, e.g*., City of Arlington, Texas Comments at 14-15; City of Detroit, Michigan Comments at 4-5; Coalition of Texas Cities Comments at 54-67, 69-70; New York City Comments at 10-12; SCAN Comments at 7-13. Accordingly, PCIA and The DAS Forum focus this section of their reply comments on the legal arguments raised by NLC in their comments.

those ambiguities that delay deployment of new services, and generally provide service providers, state and local governments and consumers with greater certainty as to how Sections 253 and 332(c)(7) will be interpreted.[196] As discussed below, the Commission has broad authority under the Act and precedent to take these necessary and important steps to facilitate broadband deployment.

1. The Commission Has the Authority to Regulate Facilities Used in Connection with Communications and to Adopt Rules to Improve Rights-of-Way Governance.

As a threshold matter, NLC broadly asserts that the Act "does not inherently give the Commission authority to regulate facilities merely because the facilities are used or useful in connection with the provision of communications services" and "does not support Commission regulation of local right-of-way practices."[197] Neither of these statements is correct.

First, even without regard to Sections 253 and 332(c)(7), it is well settled that the Act gives the Commission extensive regulatory authority over communications:

> In enacting the Communications Act of 1934, Congress intended "to confer upon the Commission sweeping authority to regulate 'in a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.'" In accordance with this goal, the provisions of the Communications Act are "explicitly applicable to

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[196] *See, e.g.*, PCIA and DAS Forum Comments at 37-44, 47-51; CTIA Comments at 25-27, 37-43; AT&T Comments at 19-20; CenturyLink Comments at 17-19; Level 3 Comments at 3-4, 7, 10; NTCA Comments at 3; Verizon Comments at 9-10, 25-26, 32-36, 39-41. Specifically, PCIA and The DAS Forum recommended, *inter alia*, that the Commission (1) issue a rule interpreting Section 332(c)(7) that prohibits denial of new requests to collocate on a structure where another provider is already located; (2) shorten the "shot clock" rule for collocations on existing structures; (3) adopt a rule that amends the *Shot Clock Ruling* to deem applications granted at the end of the review period; (4) issue a rule stating that ordinances establishing preferences for the placement of wireless facilities on municipal property are unjustly discriminatory; (5) clarify that the *Shot Clock Ruling* applies to DAS deployments; (6) clarify that DAS providers that elect to operate as telecommunications carriers and obtain CLEC status are protected by Section 253; and (7) adopt rules to clarify the scope of Section 253 provisions as they relate to DAS deployments and the exceptions available to states and localities. *See* PCIA and DAS Forum Comments at 39-44, 47-50.

[197] NLC Comments at 53 (footnote omitted).

> 'all interstate and foreign communication by wire or radio,'" and the Commission, being the "single Government agency with 'unified jurisdiction and regulatory power over all forms of ... communication,'" is granted "broad authority" to execute its mandate. The Communications Act thus directs the Commission to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[198]

Indeed, it is odd that NLC contends that the Act "does not inherently give the Commission authority to regulate facilities used in or useful in connection with the provision of communications services," given that the Act's definitions of "wire communications" and "radio communications" explicitly include "all instrumentalities, *facilities*, apparatus and services . . . incidental to such transmission[s]."[199]

In fact, well before Congress added Sections 253 and 332(c)(7) via the 1996 Act,[200] the Commission had taken preemptive action against local zoning ordinances and other state or local actions that obstructed use of communications facilities or otherwise defeated the objectives of the Act. For example, in 1985, the Commission issued a declaratory ruling preempting state and local regulations that effectively precluded use of antennas for amateur radio service (*e.g.*, via excessive local antenna height restrictions), without any specific directive from Congress to preempt.[201] Shortly thereafter, the Commission adopted a rule preempting excessive state and

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[198] *Building Owners and Management Ass'n Int'l v. FCC*, 254 F.3d 89, 94 (D.C. Cir. 2001) ("*BOMA*") (citations omitted); *see also Total Telecommunications Services, Inc. v. American Telephone and Telegraph Co.*, 919 F. Supp. 472, 478 (D.D.C. 1996), *aff'd*, 99 F.3d 448 (D.C. Cir. 1996) ("The powers granted to the FCC are a reflection of Congress's intention that one governmental entity be vested with the responsibility of developing, coordinating and enforcing a uniform telecommunications policy.") (citation omitted).

[199] 47 U.S.C. § 153(40), (59) (emphasis added).

[200] *See* PCIA and DAS Forum Comments at 58-61.

[201] *See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, Declaratory Ruling, 50 Fed. Reg. 38813 (1985).

local regulation of the placement of satellite earth stations.[202] In so doing, the Commission determined that "the broad mandate of Section 1 of the Communications Act to make communications services available to all people of the United States and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communication system establish the existence of a congressional objective in this area."[203]

In addition, Section 201(b) of the Act gives the Commission authority to issue rules interpreting ambiguities in Section 253 and 332(c)(7) – including the authority to improve rights-of-way governance.[204] Section 201(b) of the Communications Act states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[205] In *AT&T Corp. v. Iowa Utilities Board*,[206] the United States Supreme Court stated in no uncertain terms that Section 201(b) "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[207] The Court thus

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[202] *See Common Carrier Services; Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, Report and Order, 51 Fed. Reg. 5519 (1986) ("*1986 Satellite Preemption Order*").

[203] *Id.* at ¶ 23 (footnote and citation omitted). The Commission also cited Section 605 of the Act (47 U.S.C. § 705), which afforded consumers certain rights to receive unscrambled and unmarketed satellite signals. Section 605 did not, however, specifically direct the Commission to preempt state and local regulation of satellite earth stations. Notwithstanding this precedent, NLC contends that prior to the 1996 Act the Commission's authority over state and local regulation was limited by the federal pole attachment law (Section 224 of the Act). It appears NLC is referring to Section 224(a)(1), which in relevant part states that the term "utility" does not include "any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1). NLC overlooks the fact that Congress passed Section 224 as part of the Communications Act Amendments of 1978, nearly a decade prior to the amateur radio and satellite earth station preemption decisions cited above (which themselves predate the 1996 Act). NLC also cites no authority for the novel proposition that Section 224's exemption of state-owned utilities limits the Commission's authority under other provisions of the Act to preempt state or local laws that conflict with federal objectives. *See* NLC Comments at 24, 53, 56-57.

[204] *See* PCIA and DAS Forum Comments at 63-66.

[205] 47 U.S.C. § 201(b).

[206] 525 U.S. 366 (1999).

[207] *Id.* at 380 (emphasis in original); *see also id.* at 377 ("Since Congress expressly directed that the 1996 Act, along with its local competition provisions, be inserted into the Communications Act of 1934, the (continued on next page)

held that Section 201(b) gives the Commission the necessary authority to adopt rules implementing Sections 251 and 252 (both of which were added by the 1996 Act), and this reasoning applies with equal force to Sections 253 and 332(c)(7).[208] The Sixth Circuit agreed, concluding that Section 201 gives the Commission "clear jurisdictional authority" to interpret every provision of the Communications Act.[209]

Moreover, the Commission's Section 201(b) rulemaking authority is buttressed by Section 4(i) and Section 303(r), the latter of which authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."[210] Together, these sections give the Commission broad authority to interpret ambiguities in the Act, including those in Sections 253 and 332(c)(7). For example, Section 253(a) does not provide any specifics as to what types of non-federal restrictions "may prohibit or have the effect of prohibiting" telecommunications

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Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions.") (footnote and citations omitted).

[208] *See Cablevision of Boston v. Public Improvement Commission*, 184 F.3d 88, 97 (1st Cir. 1999) ("[R]ather than shielding incumbent telephone companies from competition, [the 1996 Act] requires them to provide other participants in the telecommunications market with competitive access to their networks and services. . . Three central provisions of the [1996 Act] – § 251, § 252, and § 253 – instantiate this policy … Section 253 is aimed at those who might impede the open competition engendered by §§ 251 and 252.") (citation omitted).

[209] *See Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (June 15, 2009); *see also* Verizon Comments at 28 ("The Commission has precisely the same authority in this case to interpret and harmonize the various provisions of § 253 to prohibit local requirements that materially inhibit or limit competition. As in the Title VI context, the Commission's authority to interpret § 253 necessarily includes the power to interpret, reconcile, and implement its various subsections. This authority applies to the Commission's evaluation of excessive or discriminatory right-of-way fees.").

[210] 47 U.S.C. § 303(r); *see also Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). In adopting the *Shot Clock Ruling*, the Commission determined that Sections 201(b), 4(i) and 303(r) gave it the authority to interpret Section 332(c)(7). *See Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, 14001 ¶ 23 (2009) ("*Shot Clock Ruling*"), *recon. denied*, 25 FCC Rcd 11157 (2010), *appeal pending sub nom., City of Arlington and City of San Antonio v. FCC*, Nos. 10-60039 & 10-60805 (5th Cir. filed Jan. 14, 2010).

service. Likewise, Section 253(c) does not provide any specific guidance as to what types of conduct constitutes permissible management of public rights of way, what types of fees qualify as "fair and reasonable" or what the phrase "competitively neutral and nondiscriminatory" means. There are similar ambiguities in Section 332(c)(7) and, as is the case with Section 253, the Commission is permitted to "fill the gap" with interpretive rules.[211]

Accordingly, there is no merit to NLC's suggestion that the Act puts rights-of-way and any communications facilities in them beyond the Commission's jurisdiction. The Commission's authority to address how, when and where communications services are offered was established well before passage of Sections 253 and 332(c)(7) and remains in force to this day.[212]

2. The Commission and the Courts Have Rejected NLC's Narrow Reading of "Prohibit or Have the Effect of Prohibiting" in Section 253(a).

NLC suggests that the Commission cannot preempt under Section 253(a) unless a State or local authority has imposed an absolute bar to entry.[213] Section 253(a) states:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the

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[211] *See generally* PCIA and DAS Forum Comments at 64-66.

[212] For example, in *BOMA*, the D.C. Circuit upheld the Commission's decision to expand the scope of its "OTARD" rule (47 C.F.R. § 1.4000) to permit preemption of non-federal restrictions on customer premises antennas used by tenants in *rental* properties. *See* 254 F.3d at 94-97. The Commission subsequently expanded the OTARD rule again to cover customer premises antennas used for fixed wireless voice and broadband services, even though the governing statute, Section 207 of the 1996 Act, does not make specific reference to these services. In support, the Commission relied on its above-described authority under Sections 1, 4(i), 201(b), and 303(r) of the Act, and its mandate to accelerate broadband deployment under Section 706. *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, 19 FCC Rcd 5637, 5640 ¶ 8 (2004) ("[T]he Commission's provision of these important consumer protections to fixed wireless customers serves goals articulated by Congress in Sections 1, 706 and Title II of the Communications Act. As such, the Commission's decision is within the ancillary authority delegated to the Commission by Congress in Sections 1, 4(i), 201(b) and 303(r) of the Act to make regulations necessary to carry out the Act's provisions.").

[213] *See* NLC Comments at 53-57.

> ability of any entity to provide any interstate or intrastate telecommunications service.[214]

Relying on a very narrow interpretation of "prohibit or have the effect of prohibiting," NLC contends that the Commission cannot "preempt [under Section 253(a)] a State or local fee if [it] decided the fee were unreasonable," nor can it use Section 253(a) preemption to "accelerate right-of-way management or oversee local compensation."[215] NLC similarly contends that Section 253(a) leaves the Commission no authority to "preempt local requirements that might delay or impede the provision of service,"[216] nor any authority to "regulate rights-of-way, or right-of-way compensation merely because it wishes to make it simpler and cheaper for broadband providers to enter the market."[217]

The Commission, however, has rejected such a narrow reading of Section 253(a):

> In addition to outright prohibitions of entry, section 253(a) also forbids state and local governments from enforcing any statute, regulation, or other legal requirement that has the effect of prohibiting any entity's ability to provide any interstate or intrastate telecommunications service. In evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, *we consider whether it "materially inhibits or limits the ability of any*

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[214] 47 U.S.C. § 253(a). Section 253(b) provides state authorities with a "safe harbor" permitting them to demonstrate that the regulation or action in question imposes "on a competitively neutral basis … requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service and safeguard the rights of consumers." Section 253(c) preserves a state or local government's authority to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way …." Section 253(d) authorizes the Commission to issue declaratory rulings preempting state or local government action that violates Section 253(a) or Section 253(b) and is not otherwise saved by Section 253(c). 47 U.S.C. § 253(b)-(d).

[215] NLC Comments at 53-54.

[216] *Id.* at 54.

[217] *Id.* at 57.

> *competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."*[218]

Thus, to cite just one example, the Commission has stated that undue delays in processing of franchise applications may be preemptible under Section 253(a) where the prohibition of service is a possibility but not a certainty:

> We make clear, however, the Commission's serious concerns about the potential adverse effect on the development of local exchange competition caused by unreasonable delay by local governments in processing franchise applications and other permits. If a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority…. [W]e also note that regulatory delays may threaten the viability of financing arrangements for new entry or transactions for the purchase of existing facilities…. [I]n certain circumstances a failure by a local government to process a franchise application in due course may "have the effect of prohibiting" the ability of the applicant to provide telecommunications service, in contravention of section 253.[219]

Courts too have adopted the Commission's more flexible interpretation of the "prohibit" language in Section 253(a). As noted by the Tenth Circuit: "[T]he extent to which the statute is a 'complete' bar *is irrelevant*. § 253(a) forbids any statute which prohibits or has 'the effect of prohibiting' entry. *Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.*"[220] Four years later, the Court reaffirmed its position: "A regulation need not erect an absolute barrier to entry in order to be found prohibitive."[221]

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[218] *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21439 ¶ 98 (1997) (footnote omitted).

[219] *Classic Telephone, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 15619, 15634 ¶ 28 (1997), *vacated on procedural grounds*, 15 FCC Rcd 25101 (2000).

[220] *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) (emphasis added).

[221] *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1269 (10th Cir. 2004) ("*Santa Fe*").

The First and Second Circuits have agreed.[222] In *Guayanilla*, for instance, the First Circuit held that a local ordinance's imposition of a 5% gross revenue fee together with certain certification requirements was preempted under Section 253(a), as they "materially inhibit[ed] or limit[ed]" the plaintiff carrier's ability "to compete in a fair and balanced legal and regulatory environment."[223] In *TCG New York*, the Second Circuit found that a local ordinance "clearly [had] the effect of prohibiting" the plaintiff carrier ("TCG") from providing telecommunications service where it gave the local governing authority the right to reject any application based on any "public interest factors . . . that are deemed pertinent by the City."[224] The Second Circuit likewise found that "the extensive delays in [the] processing [of] TCG's request for a franchise [had] prohibited TCG from providing service for the duration of the delays," further justifying preemption of the ordinance under Section 253(a).[225]

NLC's overly restrictive interpretation of Section 253(a) would also lead to absurd results – in effect, it would permit any jurisdiction to impose virtually any barrier to entry as long as it does not create an absolute barrier to entry. This, of course, would render Section 253 almost completely irrelevant, which is not what Congress had in mind.[226] It also bears repeating that the

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[222] *See Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir 2006) ("*Guayanilla*"); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002) ("*TCG New York*").

[223] *Guayanilla*, 450 F.3d at 19 (citations omitted); *see also Santa Fe*, 380 F.3d at 1271 (finding that local ordinance imposed "substantial costs" and thus satisfied the "materially inhibit" test).

[224] *TCG New York*, 305 F.3d at 76-77; *see also Santa Fe*, 380 F.3d at 1270.

[225] *TCG New York*, 305 F.3d at 76-77. The Court also found that a variety of non-fee provisions in the Ordinance were not sufficiently related to management of public rights of way and thus were preempted under Section 253(a) and not saved from preemption under Section 253(c). *Id.* at 81.

[226] *See, e.g., City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005) ("Congress enacted the Telecommunications Act of 1996 (TCA) to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.' One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local
(continued on next page)

Commission concluded in the *2010 Sixth Broadband Deployment Report* that broadband was not being deployed to all Americans in a reasonable and timely manner.[227] NLC's interpretation of Section 253(a) will not help the Commission solve that problem.

Finally, while matters pertaining to rights of way (or tower siting) may implicate issues of concern to state and local authorities, "it must be emphasized that the relative importance to states and local jurisdictions of their own laws is not the proper focus of a decision to preempt."[228] The United States Supreme Court has held that "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' is unworkable."[229] Accordingly, Commission preemption under Section 253 is not automatically precluded merely because State and local authorities may deem rights-of-way or tower siting as to be primarily a matter of local concern.[230]

3. The Commission Can Clarify Ambiguities in Section 253(c) Without Divesting States and Localities of Authority to Oversee and Charge Fees for Rights of Way.

NLC states that Section 253(c) "specifically preserves local authority to manage the rights-of-way and to recover fair and reasonable right-or-way compensation."[231] Section 253(c) provides:

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governments upon the installation of facilities for wireless communications, such as antenna towers.") (citations omitted).

[227] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9557-58 ¶¶ 1-2 (2010), *cited in NOI*, 26 FCC Rcd at 5398-99 ¶ 53.

[228] *1986 Satellite Preemption Order* at ¶ 27.

[229] *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005, 1015 (1985).

[230] *See* NLC Comments at 60.

[231] *Id*. at 57.

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[232]

PCIA and The DAS Forum do not disagree, and thus have not recommended that the Commission usurp these functions from state and local governments.

NLC overreaches, however, by suggesting that Section 253(c) gives local governments an unassailable right to charge fees that exceed their legitimate costs of affording telecommunications providers with access to local rights-of-way.[233] Importantly, judicial precedent indicates otherwise. As the First Circuit has recognized: "[F]ees should be, at the very least, *related* to the actual use of rights of way and 'the costs [of maintaining those rights of way] are an essential part of the equation.'"[234] Furthermore, Section 253(c) cannot be sensibly read as affording state and local governments unlimited freedom to set right-of-way fees above cost without risk of preemption under Section 253(a). Rather, Section 253(c) may save a right-of-way fee from Section 253(a) preemption only if the fee is determined to be, *inter alia*, "fair and reasonable," neither of which are defined in the statute.

For that very reason, PCIA has asked the Commission to exercise its authority to interpret the 1996 Act and adopt rules which, at a minimum, clarify that any fee that exceeds a municipality's legitimate costs of processing a right-of-way or wireless siting application – and,

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[232] 47 U.S.C. § 253(c).

[233] *See, e.g.*, NLC Comments at 57. ("Congress recognized that '[t]he right-of-way is most valuable of real estate the public owns,' and it made an affirmative decision to clarify that nothing in Section 253 would limit State and local governments' ability to recover this value.")

[234] *Guayanilla*, 450 F.3d at 22 (citation omitted) (alteration and emphasis in original).

in the case of a right-of-way application, the municipality's legitimate costs of making access available (including, for example, any reasonable maintenance of the right-of-way) – is presumptively not "fair and reasonable" and "ha[s] the effect of prohibiting" the provision of telecommunications and personal wireless services.[235] Such rules would not, as NLC would have it, displace state and local governments from the fee-setting process. Under PCIA's proposal, state and local governments would be presumed to be not "fair and reasonable."

4. The Commission Has Authority to Adopt Rules Interpreting Section 253(c).

Any Commission rules implementing Section 253 must put to rest any ambiguity over whether the Commission has authority to address right-of-way management practices and fees for which state and local governments seek protection under the Section 253(c) "safe harbor." NLC contends that the Commission has no authority to address Section 253(c) matters at all, citing the fact that Section 253(d) directs the Commission to preempt violations of Section 253(a) and (b) but makes no reference to Section 253(c).[236] NLC further asserts that three federal circuits have supported its position, but the cases NLC cites do not stand for the blanket proposition that "three federal circuit courts have concluded that Congress stripped the FCC of jurisdiction to decide Section 253(c) issues," as NLC claims.[237] Rather, these cases are about the appropriate forum for *enforcement* under Section 253 – namely challenges of specific local

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[235] *See* PCIA and DAS Forum Comments at 57.

[236] *See* NLC Comments at 60-61. Section 253(d) states: "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d).

[237] NLC Comments at 61 n.200 (citing cases).

ordinances – and not the scope of the Commission's interpretive authority.[238] Indeed, the Tenth Circuit in *Qwest* refers to, and ultimately follows, the Commission's own interpretation of Section 253(c), finding that "the FCC's interpretation of the subsection is appropriate" and supported by the legislative history.[239]

The only takeaway that can be easily extracted from the three cases NLC cites is that Section 253 is not inherently clear.[240] It thus is not surprising that the Circuits are split on how to interpret Section 253. In fact, the Second Circuit has raised serious doubts as to whether Congress intended to divest the Commission of all jurisdiction over all matters raised under Section 253(c), particularly the Commission's ability to interpret that subsection:

> White Plains argues that the legislative history of subsection (d) establishes that it was intended to deprive the FCC of jurisdiction over issues involving the interpretation of subsection (c)…. Several circumstances, however, make it difficult to accept White Plains's argument…. [T]he plain language of the text which allows the FCC to preempt provisions inconsistent with subsection (a)

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[238] In the cases cited by NLC, the courts analyzed whether the omission of subsection (c) in Section 253(d) implied a "private right of action, instead of FCC jurisdiction" for violations of Section 253(c). *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 623 (6th Cir. 2000) ("*TCG Detroit*"); *see also BellSouth Telecomm'ns, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1189-91 (11th Cir. 2001) ("*BellSouth*"); *Qwest Comm'ns v. City of Santa Fe*, 380 F.3d 1258, 1265-67 (10th Cir. 2004) ("*Qwest*"). Indeed, the Sixth Circuit in *TCG Detroit* clearly contemplated circumstances where violations of Section 253(c) *could* rise to the level of violations of Section 253(a) – and thus be subject to Commission enforcement of its preemption authority – although they need not do so. The court noted that "[a] violation of §253(c) might well not involve violating §253(a); unfair or unreasonable fees need not rise to the level of erecting a barrier to entry, while only the latter violation authorizes the Commission to act pursuant to §253(d)." *TCG Detroit*, 206 F.3d at 624 (original emphasis omitted).

[239] *Qwest*, 380 F.3d at 1272 (citing *Classic Tel., Inc.*, 11 FCC Rcd 13082, 13103 (1996) (finding that the "competitively neutral" and "nondiscriminatory" requirements of Section 253(c) apply to compensation regulations and to the management of rights-of-way). Likewise, the Eleventh Circuit in *BellSouth* relied on the Commission's interpretation of the statute to determine that Section 253(c) is an exception to 253(a). *See BellSouth*, 252 F.3d at 1188. The court had noted that "[a]s the federal agency charged with implementing the Act, the FCC's views on the interpretation of § 253 warrant respect." *Id.* at n.11.

[240] *Qwest*, 380 F.3d at 1265 n.3 ("Several courts have noted the ambiguities of §253."); *BellSouth*, 252 F.3d at 1187 ("The confusion arises because of perceived inconsistencies within the structure of the statute."); *id.* at 1189 ("In this case, an analysis of the statutory language creates more questions than it answers about what causes of action Congress intended to create…."); *TCG Detroit*, 206 F.3d at 623 ("The subsections of §253 … raise several questions.").

> strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption. Second, the provisions of §253(d) are mandatory: the FCC "shall preempt" local statutes to remedy violations of §253(a) or (b). In light of the FCC's general regulatory authority, the inclusion of a mandatory regulatory role does not logically foreclose FCC action in the areas where it is not mandatory. Third, because §253(c) provides a defense to alleged violations of §253(a) or (b), if §253(d) were read to preclude FCC consideration of disputes involving the interpretation of §253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint…. However, we will not assume that Congress made such a choice here without stronger evidence.[241]

Consistent with the Second Circuit's reasoning quoted immediately above, the Commission should adopt a rule interpreting ambiguities in Section 253(c), or otherwise clarify that it has jurisdiction to rule directly on whether a state or local government's rights-of-way management practices or fees are saved from preemption under Section 253(a).

5. The Commission Has Authority to Adopt Interpretative Rules and Take Other Actions with Respect to Section 332(c)(7).

For the reasons already discussed at length in PCIA and The DAS Forum's initial comments, the Commission can and should issue rules interpreting and implementing Section 332(c)(7) and take other remedial steps to clarify and strengthen the effectiveness of the statute. The scope of the Commission's authority under Section 332(c)(7) is currently before the Fifth Circuit in the "Shot Clock" appeal.[242] Adoption of the *Shot Clock Ruling* was well within the

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[241] *TCG New York*, 305 F.3d at 75-76; *see also BOMA*, 254 F.3d at 96 ("Where the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law.").

[242] *See* NLC Comments at 63 & n.207, *citing City of Arlington v. FCC*, No. 10-60039 (submitted for decision June 8, 2011).

Commission's statutory authority, and the spirit of that decision should inform the Commission's actions here. As stated by the Commission in its initial brief before the Court:

> Congress enacted Section 332(c)(7) of the Communications Act to "reduc[e] the impediments imposed by local governments upon the installation of facilities for wireless communications." … As the agency entrusted with administering the Communications Act, the FCC reasonably interpreted ambiguous statutory language in those congressionally mandated limitations on the zoning authority of State and local governments. The Commission's statutory interpretation, which promotes clarity and legal predictability, is fully consistent with Congress's intent to eliminate unreasonable obstructions to the deployment of wireless telecommunications infrastructure.[243]

PCIA and The DAS Forum hereby incorporate by reference the briefs of the Commission and the intervenors in support of the Commission in the Fifth Circuit, which further detail the basis for the Commission's authority under Section 332(c)(7).[244]

6. The Congressional Directives in Section 706 Must Remain the Commission's Guidepost in This Proceeding.

NLC attempts to diminish the role of Section 706 in this proceeding.[245] Section 706(a) directs the Commission "[to] encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment."[246] As referenced above, the Commission concluded in its *2010 Sixth Broadband Deployment Report* that broadband was not being deployed to all Americans in a reasonable and timely manner. In this situation, Section 706(b) requires that the agency "take

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[243] FCC Brief for Respondents, *City of Arlington*, at 21 (filed Dec. 22, 2010).

[244] *See id*.; Joint Brief of Intervenors CTIA and Verizon Wireless in Support of Respondents, *City of Arlington* (filed Dec. 29, 2010).

[245] *See* NLC Comments at 63-64.

[246] 47 U.S.C. § 1302(a).

immediate action to accelerate deployment of [broadband] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[247] As Verizon correctly notes, "Section 706 counsels in favor of interpreting § 253 as barring local actions that have the effect of impeding investment in broadband infrastructure."[248]

B. NLC's Constitutional Arguments Are Red Herrings and Should Be Dismissed as Such.

1. The Issuance of the Proposed Rules Interpreting Ambiguous Terms in Section 253 Would Not Affect a Fifth Amendment Taking under *Loretto*.

NLC argues that curtailing right-of-way charges would raise Fifth Amendment concerns. Specifically, it states that "[i]f the federal government were to require a local government to place a wire on its property without compensation, it would constitute an unlawful taking under the Fifth Amendment."[249] This sort of "what if" advocacy is a classic red herring. Neither the *NOI* nor PCIA and The DAS Forum are advocating that the Commission interpret Section 253 in a manner that would compel a State or local government to permit a telecommunications provider to use a right of way without compensation.

To the contrary, PCIA and The DAS Forum are recommending that the Commission interpret ambiguities in the statute to clarify what state or local actions "may prohibit or have the effect of prohibiting" the provision of telecommunications services. This includes the adoption of rules that establish exactly when rights-of way management practices, application procedures, and access terms are discriminatory, such that they may "have the effect of prohibiting" the

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[247] PCIA and DAS Forum Comments at 58-59 (quoting Section 706(b)) (footnote omitted).

[248] Verizon Comments at 38-39.

[249] NLC Comments at 64 (footnote omitted). The Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

provision of telecommunications services; or, alternatively, when the fee charged to use a right of way or process a right-of-way application is so unreasonable that it may "have the effect of prohibiting" the provision of telecommunications services.[250] In other words, the Commission would not be compelling the use of or access to particular rights of way, or prescribing – let alone precluding – the fees that states and local governments may charge; it would merely be setting standards as to when the denial or terms of access or fees charged would effectively prohibit service and thus violate Section 253.

Hence, NLC's citation of the Supreme Court's *Loretto* decision in inapposite.[251] Indeed, the Court has made it clear that its holding in *Loretto* is "very narrow."[252] In that particular case, the Supreme Court invalidated a New York statute authorizing a cable television company to place cable equipment on a private property owner's building on the grounds that the statute constituted a *per se* physical taking.[253] The Court found that "physical intrusion by government [is] a property restriction of an unusually serious character for purposes of the Takings Clause," and that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a [per se] taking has occurred."[254] *Loretto* is irrelevant where use of the property in question – a public right of way – requires the consent of state or local authorities and is not

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[250] *See* PCIA and DAS Forum Comments at 49-50, 54-55, 56-57.

[251] NLC Comments at 64 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) ("*Loretto*")).

[252] *Loretto* at 441.

[253] *Id.* at 438-9.

[254] *Id.* at 426.

compelled. "'Required acquiescence' … 'is at the heart of the [Loretto] concept of occupation.' It is thus 'the invitation, not the rent, that makes the difference.'"[255]

Likewise, NLC's reliance on the *50 Acres* decision is misplaced.[256] In that case, the Supreme Court held that where a public condemnee is required to replace a condemned facility, it is not entitled to compensation measured by the cost of acquiring the new facility if the market value of the condemned property is ascertainable.[257] Again, neither Section 253 nor the regulations under consideration in this proceeding create any "taking" of public property. Instead, the Commission is only being asked to clarify when the terms of access to rights of way become discriminatory such that they may have the effect of prohibiting telecommunications services. The regulations proposed by PCIA and The DAS Forum would not preclude compensation – rather, they would only establish that fees not related to costs are presumptively unreasonable because they may have the effect of prohibiting telecommunications services.[258]

Perhaps sensing its fate under *Loretto and 50 Acres*, NLC offers another possibility: "[R]eading the Act to both compel the government to provide access and to allow the FCC to limit compensation would create significant takings issues."[259] Since compelled access (a physical taking) is a non-starter here, a state or local government would only be left with a

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[255] *BOMA*, 254 F. 3d at 98 (quoting *FCC v. Florida Power Corp.*,480 U.S. 245, 252-3 (1987)) (alteration in original) (footnote omitted).

[256] *See* NLC Comments at 64 & n.213 (citing *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) ("*50 Acres*")).

[257] *See* 469 U.S. at 25-26.

[258] *See* PCIA and DAS Forum Comments at 50, 57. The Supreme Court has held that where *per se* physical takings are not an issue, regulations concerning the economic relations between property owners and tenants are not barred under the Fifth Amendment as long as they are not confiscatory. *See FCC v. Florida Power Corp*., 480 U.S. 245, 252-53 (1987). In the pole attachment context, the Court has held that a rate providing for the recovery of "the fully allocated cost of the construction and operation of the pole to which the cable is attached" is not confiscatory. *Id*. at 253-54. The proposal that fees not related to costs be deemed presumptively unreasonable falls well within this standard.

[259] NLC Comments at 65 (footnote omitted).

potential claim as to fees, and thus would have to demonstrate that a particular Commission regulation of a right-of-way fee equates to a "regulatory taking." A regulatory takings claim requires "'ad hoc, factual inquiries,' and 'entails complex factual assessments of the purposes and economic effects of government action.'"[260] Because of this context-specific standard, a court would likely find that the proposed rules by themselves would not create an "'identifiable class' of applications that would 'necessarily constitute a [regulatory] taking.'"[261]

Moreover, the Supreme Court has focused on a number of factors when determining whether a regulatory taking has occurred in cases where there is no compelled access to property, including: (1) whether the regulation has deprived the property owner of all economically viable uses of his or her property); (2) whether the regulation has deprived the owner of his or her reasonable investment-backed expectations; and (3) whether the regulation substantially advances a legitimate state interest.[262] NLC has not addressed any of these, and there otherwise is no need for the Commission to let NLC's random speculation about regulatory takings shape its decisions in this proceeding.

2. Neither the Tenth Amendment Nor the Guarantee Clause Precludes the Adoption of the Proposed FCC Rules Interpreting Section 253.

As something of a throwaway argument, NLC contends that Commission "preemption of local right-of-way practices and compensation would offend the Tenth Amendment and the

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[260] *BOMA*, 254 F. 3d at 99 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) and *Yee v. City of Escondido,* 503 U.S. 519, 523 (1992)) (footnote and citation omitted).

[261] *Id.* (alteration in original).

[262] *See Multi*-Channel *TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995) (discussing Supreme Court precedent on regulatory takings).

Guarantee Clause of the Constitution."[263] The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[264] From this, NLC posits that the Commission might be in danger of violating the Tenth Amendment "if [it] were to assume control over right-of-way practices or compel local governments to provide access to rights-of-way on federally prescribed terms."[265]

Of course, the *NOI* does not propose, and PCIA and The DAS Forum are not suggesting, that the Commission "assume control" over rights-of-way practices or "compel … access" pursuant to federally prescribed terms. As there is no evidence that the Commission actually intends to do any of this, the point, again, is moot. Instead, PCIA and The DAS Forum are recommending that the Commission adopt rules interpreting ambiguous language in Section 253 – in particular, by clarifying what types of non-federal activities "may prohibit or have the effect of prohibiting telecommunications service" in order to advance the Commission's broadband goals.[266]

NLC's position that Commission preemption under Section 253 might run afoul of the Tenth Amendment has little currency in any case. In *Classic Telephone, Inc.*, the Commission left no doubt about the matter:

> [T]he Tenth Amendment of the U.S. Constitution is not offended by federal preemption pursuant to section 253. Section 253 explicitly preempts State and local legal requirements. In this

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[263] NLC Comments at 65.

[264] U.S. CONST. amend. X.

[265] NLC Comments at 65.

[266] *See* PCIA and DAS Forum Comments at 40, 49-50, 55, 56-57, 64-65.

> situation, pursuant to the Supremacy Clause of Article VI of the Constitution, federal law governs.[267]

By analogy, the Second Circuit flatly rejected a Tenth Amendment challenge to Section 332(c)(7)(B)(iv), which states that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."[268] In so doing, the Court stated:

> "Where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *We have no doubt that Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities.* The statute therefore does not violate the Tenth Amendment either facially or as applied.[269]

NLC stretches its Constitutional analysis even further by suggesting that the Commission also must be wary of violating the Guarantee Clause.[270] That provision states in relevant part: "The United States shall guarantee to every State in this Union a Republican Form of Government."[271] The sole case support offered by NLC on this issue, *City of Abilene, Texas v.*

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[267] *Classic Telephone, Inc.*, 11 FCC Rcd 13082, 13108 ¶. 50 (1996), *vacated on procedural grounds*, 15 FCC Rcd 25101 (2000).

[268] 47 U.S.C. § 332(c)(7)(B)(iv).

[269] *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2nd Cir. 2000) (emphasis added) (citations omitted).

[270] *See* NLC Comments at 65-66.

[271] U.S. CONST. art. IV, § 4.

FCC,[272] does not discuss the Guarantee Clause. In that decision, the D.C. Circuit held that the Supreme Court's decision in *Gregory v. Ashcroft* requires that Congress "manifest[] its intention with unmistakable clarity" when it seeks to govern State-local relationships.[273] The D.C. Circuit held that Section 253(a) was not sufficiently clear to warrant Commission preemption of a Texas law that prohibited its municipalities from providing telecommunications services, and thus congress did not intend for the federal law to govern state-local relationships regarding the provision of telecommunications services.[274]

By contrast, nothing at issue in this proceeding has any bearing on a state's ability to regulate its municipalities or other subdivisions. Nor does this proceeding otherwise contemplate any threat to "the core of State sovereignty."[275] Regardless of the outcome of the *NOI* or any proceedings that follow it, states (and, by extension, their municipalities) will not be divested of their authority over public rights of way (including, *inter alia*, their right to assess fees for usage thereof). Rather, the Commission is merely considering whether and how to clarify the extent to which that authority may be exercised without risk of federal preemption under Section 253.

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[272] 164 F.3d 49 (D.C. Cir. 1999) (cited in NLC Comments at 66 n.220).

[273] *Id.* at 52 (citation omitted)

[274] *See id*. at 52-54.

[275] *Id.* at 53.

CONCLUSION

For the foregoing reasons and as reflected on the record, the Commission should engage in outreach and pursue the best practices and legislative and regulatory solutions recommended in these comments to improve rights-of-way access and wireless siting so that wireless infrastructure deployment can flourish and continue to meet the Nation's growing mobile broadband needs.

Respectfully submitted,

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